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ABSTRACT

In his opening statement at this hearing, committee chairman Senator Joseph Biden mentioned the National Child Protection Act of 1991; praised Oprah Winfrey's efforts to support programs and legislation to prevent sexual abuse of children; presented data on the incidence of sexual abuse of children in the home and in day care centers; and discussed the implementation of a national system of conducting background checks on individuals who apply for employment in child care occupations. Eight other senators who were members of the committee presented statements. Oprah Winfrey presented a statement in which she discussed the implementation of a background check system, explained how children who are sexual abuse victims often blame themselves for their abuse, and described the experiences of sexually abused children as they mature. Five other individuals offered verbal and prepared statements on the implementation of the background check system, presented data on child sexual abuse, and commented on issues related to the sexual abuse of children. (BC)

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PROTECTING CHILDREN IN DAY CARE: BUILDING A NATIONAL BACKGROUND CHECK SYSTEM

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

THE NATIONAL CHILD PROTECTION ACT OF 1991

NOVEMBER 12, 1991

Serial No. J-102-44

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PROTECTING CHILDREN IN DAY CARE: BUILDING A NATIONAL BACKGROUND CHECK SYSTEM

TUESDAY, NOVEMBER 12, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:08 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Present: Senators Biden, Metzenbaum, Thurmond, Hatch, Simpson, Grassley, and Brown.

The CHAIRMAN. Good morning. [Laughter.]

What's the story? You say good morning and everybody says something, and I say good morning and nobody responds. I don't understand it. Usually, it starts off that way, I say good morning and everyone stands and claps when the Senator from South Carolina walks in the room.

I want you to know, Ms. Winfrey, before we begin—by the way, welcome—that this is a typical hearing for us. I just want you to know that your presence here has had no impact on the press or anyone being here. We are so delighted that you are here, we really are.

Ms. WINFREY. Thank you.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. We are even more delighted, quite frankly, with the intense interest you have shown in the subject that this committee, and not just this committee, but I believe every member of Congress, as well as the White House, has a keen concern in.

Today's hearing addresses a problem that I believe is one of the most threatening dangers confronting our Nation—the tragedy of child abuse.

More than simply decrying the tragic extent and the terrible consequences of child abuse, however, today's hearing will bring to light an important weapon in the fight against child abuse.

The committee will hear testimony from Ms. Oprah Winfrey, a woman we all know as both a television personality and a leader in the fight against child abuse, and, in my view, one of the finest actresses that exists today.

Today, Ms. Winfrey brings before the committee not only her passion, energy, and commitment to this cause, but also a concrete proposal to fight child abuse.

(1)

Ms. Winfrey's testimony here today is the foundation for a legislative plan that Ms. Winfrey has asked me and others to introduce, and I will be introducing it, with Senator Thurmond and other Senators, later this week. It is referred to as the National Child Protection Act of 1991.

I might at this point pay special tribute to Governor Thompson of Illinois, whom Ms. Winfrey had gone to earlier in the year, or maybe even before that, I am not sure exactly when, and asked for his legal and political judgment on how to deal with this horrible problem, and I want at the outset to give him and his staff credit for the drafting of the legislation that was proposed by Ms. Winfrey to me, as the chair of the committee, and to others in the Senate.

Governor, welcome today. It is a delight to have you here. It is a pleasure working with you.

Ms. Winfrey's plan builds upon the work done, as Governor Thompson pointed out in the proposal package he submitted to the committee, in this area over the past 7 years, beginning with the DeConcini-Miller bill. George Miller, a House Member from California, has been a leader in this fight on child abuse, and Senator DeConcini and he, some years ago, introduced a bill, and then much later, the Reid-Biden amendment, and after that, the McConnell bill, just to name three bills that have attempted to deal with the same subject matter that is being dealt with here today, that encompass the same basic proposal that is the core of this legislation.

This legislation, in my view, makes a very valuable contribution in this field, by adding a new and, in my view, the best yet proposal of those that have come before it, in order to deal with at least one aspect of child abuse.

The idea behind Ms. Winfrey's proposal is simple, that is, we must do everything we can to detect convicted criminals before they are hired as child care workers, not after another tragedy takes place.

If such a plan could stop just one abuser, it would be worth it. But as today's hearings will show, I believe, it seems likely that a comprehensive national background check system would block literally thousands of dangerous criminals from obtaining jobs in the day care field.

To understand just how vital it is that we act today, we need only to review the epidemic proportions of child abuse in America:

More than 2,500,000 reports of child abuse and neglect are made each year—2,500,000, that is what is reported each year. That does not account for the potentially tens or hundreds of thousands of cases that are not reported each year.

Nationwide, arrest for offenses against children rose faster than any other crime from 1969 to 1990. Between 1985 and 1990, the Nation saw a 31-percent increase in the reported incidents of child abuse—three times the increase in child abuse in the previous 5-year period.

The charts I am going to refer to in a moment will outline—and we will leave them there for the public and our colleagues in the press to see, that graphically, literally and figuratively, point out the degree of the increase of this problem.

Of course, many abused children are victimized in their homes. But there is a large and growing number of children being victimized outside the home.

Today, about 6 million preschool children are in day care programs for some or all of the day. Of course, the vast majority of the American day care centers are safe, secure places, and the vast, vast majority of all day care workers who care for our children are dedicated, loving professionals. Nothing that is said or talked about here today should serve to undermine this basic fundamental fact.

Still, the rapidly growing rise in children being cared for outside their homes must be met by an expanded national effort to protect these children.

Proposals we will discuss today offer hope for doing just that, using criminal background checks to identify potential child abusers before they are hired as child care workers. At the heart of Ms. Winfrey's proposal that the committee will hear about today are some specific notions:

First, specific timetables, so that accurate, up-to-date information on child abuse convictions are available on a national basis within 3 years. As many do not know, many of the State systems simply do not have, notwithstanding the desire to check, simply do not have up-to-date systems that allow a police agency or anyone else checking, to be able to determine the extent of the number of convictions, if any, of an individual.

Direct Federal assistance to help the States to improve their criminal justice records is a second aspect of this proposal, and measures to protect the rights of all, speeding access to background check information, providing appeal procedures to correct inaccuracies in these checks, and confidentiality protections for information contained in criminal record checks.

Some may ask is a national background check system for child care workers needed. Unfortunately, I believe the answer is yes, and I believe that we will see from the testimony today that it is yes.

Data this committee is releasing today shows that, within the past year alone, similar systems in just six States have identified more than 6,200 individuals convicted of serious criminal offenses, such as sex offenses, child abuse, violent crimes, and felony drug charges—6,200 such people who were seeking jobs as child care providers, and this is only in 6 States, 6 out of 50 States that have the system.

As today's witnesses tell us, the criminals detected by background check systems are some of the most violent predators that we have in this country.

The committee is also releasing today a report, prepared at our request, from the State of California. That report shows that in one single day last week, last Thursday, to be precise: One, a convicted murderer; two, a convicted rapist who finished serving his sentence just 15 months ago; and three, a convicted drug dealer—all applied for jobs caring for children, and all might be working in day care centers this week, if not for the background check system that California has in place.

How many children would have been put at risk, if these convictions had not been detected? How many children are at risk today,

because they live in States without checks to identify convicted criminals? To both questions, of course, the answer is too many.

By 1995, 8 million preschool children will spend all or part of their day in a child care center. It is the expectation of every parent that their child would be protected from harm in these centers, and it is the responsibility of this Government, in my view, to insure these rights and guarantee these expectations of parents as best we can.

I think all of our witnesses, most especially Ms. Winfrey, who lends an articulate and powerful voice to this cause, are going to be underscoring much of what was said here thus far, and I thank them all for joining us today, working together in the effort to make the world and, in a very specific sense, child care facilities safer for our children.

Now, Ms. Winfrey, the way we do this is I yield to my colleagues if they have any opening statements, and then we will move to you for an opening statement, and then some questions, if we may.

Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, today we will hear testimony regarding what we can do as a nation to help prevent child abuse and molestation. We will examine efforts being undertaken in the private sector to prevent child abuse. In addition, much of the testimony will focus on legislation which I will be introducing with Senator Biden and others later this week, the National Child Protection Act of 1991.

Mr. Chairman, the protection of innocent children from abuse is a vastly important matter of national concern which must be addressed. Frankly, I can think of no crime more deserving of our national attention and harsh punishment than the molestation or abuse of a child.

Sadly, whether sexual or physical, child abuse takes the youth and innocence away from our children, in addition to often ruining their lives. Those who violently prey upon childhood innocence must be caught, prosecuted, and sentenced to tough criminal penalties. Yet, as we will hear today, society must also take steps to decrease the likelihood that these vicious criminals will have access to our children.

Mr. Chairman, as we consider this issue, some recent statistics are disturbing. Reporting child abuse and neglect cases are on the rise. It is estimated that there are more than 2.5 million reported cases of suspected child abuse every year.

Furthermore, statistics provided to Congress by the National Center for Missing and Exploited Children clearly demonstrates that child molestation is widespread: Child Help USA estimates—and listen to these figures—that 1 in 3 girls and 1 in 6 boys will be sexually abused before the age of 18. More than half of sexually abused children are victimized before they reach 7 years of age. Without question, this is a critical problem which must be vigorously addressed.

Mr. Chairman, the tragedy of child abuse and molestation is further complicated by the fact that child sex offenders are oftentimes

serial offenders. In other words, these heinous criminals repeat their brutal acts over and over again.

A National Institute of Mental Health study found that the typical attacker molests an average of 117 children. Those who prey upon young boys molest an average of 281 of them. Despicably, these offenders often seek employment that will give them access to children.

In response, many organizations and individuals have worked tirelessly to make the prevention of child abuse a priority. In addition, Members of Congress, including Senators McConnell and Durenberger, have worked to increase the Federal Government's role in this area. The legislation Senator Biden and I will be introducing has grown out of all of these efforts and includes recommendations brought to our attention by Ms. Oprah Winfrey and others.

I am glad to see former Governor Thompson here today. He has taken a great interest in this matter.

This measure makes the screening of child care providers a national priority. The National Child Protection Act of 1991 will assist in identifying convicted child abusers and molesters who prey upon children by seeking employment or other activities where youngsters can be taken advantage of, like day care centers or scout troops. It would, for the first time, establish comprehensive national procedures to insure that those working with children in organized activities do not have criminal records as child abusers or perpetrators of other serious crimes.

In closing, Congress must take every step to do all it can to help the States in their unyielding effort to prevent child abuse and molestation. We must continue to work together—employers, parents, social workers and government—to improve the quality of life for our most precious and vulnerable resource, our children.

Mr. Chairman, we have many distinguished witnesses who will testify, including Senator McConnell. I am pleased that John Walsh is here today, as well as Ms. Oprah Winfrey. I look forward to their testimony, along with the other distinguished and dedicated witnesses we will hear from today.

Ms. Winfrey, I want to say that it is a great pleasure to have you here. You are known nationwide. You are one of the most popular women in America and it is an honor to have you.

Ms. WINFREY. Thank you.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simon.

OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Thank you, Mr. Chairman.

I wish it were not necessary to have a hearing on a bill like this. Unfortunately, it is. It is a growing problem and I am pleased to join as a cosponsor of the legislation. I think it is unfortunately necessary that we move.

I am also pleased to welcome Oprah Winfrey. I knew her before she was famous, Mr. Chairman. But she has used her considerable talents not just to entertain, but to enrich our culture and also improve the Nation. It is a pleasure to have you here.

Let me also note the presence of Governor Jim Thompson, who for the non-Illinoisans here, and that is all of you, he has served longer as Governor of Illinois than anyone in the history of the State of Illinois.

Also, John Walsh, I had my legislation to have a missing children program to, among other things, put missing children on the FBI computer. At that point, the FBI kept track of missing automobiles, but not missing children on their computer, and my bill was going nowhere. Then John Walsh, who faced the tragedy of his son Adam, did not just grieve, he acted and that missing children legislation became law in large part because of John Walsh's leadership, and I am very pleased to have John here today.

Thank you, Mr. Chairman.

The CHAIRMAN. We are all happy to have him back in happier circumstances.

Senator Grassley.

OPENING STATMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Oprah, his colleagues knew him before he was famous, too, that is, Paul Simon. [Laughter.]

I join as a cosponsor of this legislation, because, as more and more parents both work outside the home, our Nation's children are exposed to greater numbers of adults. From day care workers to teachers to volunteers for nonprofit organizations, these individuals are in a position to greatly assist the child, he or she, as they develop and mature.

Unfortunately, the same individuals are also in a position to take advantage of these impressionable and often defenseless children. The results can at times be very devastating and long-lasting to the individuals.

Those who employ child care workers often do their best to hire trustworthy employees. Doubtless, a vast majority of child care providers do a fine job of hiring competent professionals who pose no threat to anyone. Nonetheless, hiring individuals who work with children is a difficult process.

Unfortunately, many individuals who prey on our Nation's children seek positions where they can exercise unsupervised access over our children.

Unless employers can obtain accurate information about past offenses that these individuals have committed, they will not be able to protect the children to whom they have been entrusted.

Today, Mr. Chairman, this criminal record information is not easily accessible. Even in places where employers can obtain such information, no protection is afforded against the applicant who has committed crimes in other States that do not make such records available. The bill that we are discussing today would create a nationwide background check system that would overcome these obstacles.

Now, while this bill cannot guarantee the abolition of child abuse by child care providers, it will give those employers the ability to deny access to those individuals whose criminal background may make them unfit to be given these responsibilities, and that is why it is a good bill.

The CHAIRMAN. Thank you very much.

Senator Metzenbaum.

Senator METZENBAUM. I have no opening statement. I am simply looking forward to hearing from the witnesses.

The CHAIRMAN. Senator Hatch.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Oprah Winfrey, we welcome you to the committee. You are one of the most well-known people in America, and I personally admire your courage in being willing to speak about your own feelings with regard to this particular issue, because it is a very, very important issue that is plaguing this country.

We have problems with this issue in my home State of Utah, and it really is a matter of great concern. I was one of those who put through the child care legislation that we hope will help to resolve some of the problems of many of the mothers and fathers throughout this country, but, in particular, the single heads of households who seem to be left without really much hope in our society today. Your testimony and the testimony of my good friend John Walsh and others is extremely important to our society.

There are reported between 2 and 3 million, actually, I think between 2.5 and 3 million instances of child abuse in America every year. That is just the tip of the iceberg, as you know and as all of us know. It is a serious problem, and there are repetitive offenses by individuals who are child abusers and get away with it year after year after year.

In addition, we now have somewhere near 6 million children in child care facilities, and we expect that figure, by the end of this century, to double, if not even higher. So, we appreciate you taking time to be with us today.

I want to compliment Senators Biden and Thurmond, Senators McConnell and Durenberger and others who are leading the fight in this area, and hope to be able to lend assistance and all the help that I can in this matter.

Thanks for being here, and thanks, John, to you. Governor Thompson, welcome to the committee, and the other witnesses as well. We are very proud to have you here.

Ms. WINFREY. Thank you, sir.

The CHAIRMAN. Senator Simpson.

OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Thank you, Mr. Chairman, for holding this hearing, and I thank the witnesses for their efforts today concerning this subject which is before us.

It is a most disgraceful form of behavior. It is ugly and maddening and shameful, all at the same time. Also, it is brutal, and it is brutal because the victims are especially weak and truly innocent, and because the damage done can surely last a lifetime. This form of criminal behavior is so awful, I think it is sometimes considered unmentionable, but mention it we shall, and you will help us do that this morning. We thank you for that.

In my practice of law for 18 years, I did more than several of these, some pro bono, some court appointment. The tragedy to me

was that one parent was often doing it and the other parent was being forced to cover for that parent, while the child was simply in total confusion. So, it is very real and you are going to make it ever more real, as you present your testimony.

I think that no group of Americans require more care and more protection than these type of children, and I know that I am not alone in that feeling. When children are threatened, especially physically, we often express alarm, but I think we become ever more vigilant, and that is a critically important thing. All of us are familiar with these stories that have received national attention concerning child abuse at day care centers, and not one of us does not feel truly terrible for the children and families involved.

What is more terrible and more infuriating is that if this convicted abuser goes to another State and unchecked, gets employment working with children, either again or for the first time, so we are presented with this opportunity to do more than just feel anguished about it, we can work diligently to do something about it.

I commend the chairman and all of those who have worked on this on both sides of the aisle. I think we can get to a very workable bill. I appreciate your commitment to this cause, Ms. Oprah Winfrey. Indeed, you are held in high regard. And I have known Jim Thompson for many years and have the richest regard for him. And I knew Paul Simon when he was a State legislator in 1971, way back.

So, thank you, and we are looking forward to this testimony, which is of serious concern.

Thank you.

The CHAIRMAN. Senator Brown.

Senator BROWN. Mr. Chairman, I appreciate you holding these hearings and I look forward to the testimony.

The CHAIRMAN. Oprah Winfrey, by way of a more formal introduction, is currently in her sixth year as one of America's leading and most recognized television personalities. In 1988, she became the first woman in history to own and produce her own talk show and, as owner of Harpo Studios, she is only the third woman in history to own such a facility.

Over the past several years, Ms. Winfrey has devoted much of her time and energy to the issue of child abuse, devoting several of her shows to the issue. In addition, she produced an incredible prime-time special entitled "Nine," devoted solely to the topic of abused children.

Before beginning the "Oprah Winfrey Show," Ms. Winfrey hosted a television talk show in Baltimore from 1976 to 1984, and in 1984, she moved to Chicago, where she began the "Oprah Winfrey Show."

Before she testified, I want to make one thing clear, absolutely clear: We are flattered that you would have the good judgment to have hired Governor Thompson and that both of you came in to see me. I notice Senator DeConcini, who has been a leader in this area long before most of us got involved, says he wants to commend me—he is going to introduce a statement—commend me "for the outstanding work of Senator Thurmond and Biden in drafting the excellent bill."

We did not draft this bill. You, through Governor Thompson, drafted this bill, and the only thing I did, I want to make the record clear, is tell you, at your request, whether I would be the lead sponsor. I suggested three changes. I said if we could change three things, I would be delighted to introduce the bill.

I have never done that in my life, never before in my almost 19 years in the Senate has anyone ever come to me with a bill—and some have—that I have ever introduced. But this built upon and improved significantly all that had gone before, and I am flattered that you would have asked, and I look forward to your testimony. But credit is not warranted for me, in terms of this bill. I just hope Senator Thurmond and I and others will be vehicles that will help bring this into law, because it is needed.

The floor is yours. You have never had to listen to so many witnesses before, without having to speak, have you? This is a first, isn't it?

Ms. WINFREY. It is a little different, I must say.

The CHAIRMAN. The floor is yours, Ms. Winfrey. Thank you very much for being here.

STATEMENT OF OPRAH WINFREY, TELEVISION PERSONALITY AND CHILD ABUSE ACTIVIST

Ms. WINFREY. Thank you very much, Mr. Chairman.

To you, Mr. Chairman, Senator Thurmond and other distinguished members of this committee, I would first, as has been said, like to thank you for holding hearings on this important issue of child abuse, and I want to thank you for sponsoring and also for considering legislation to help protect our children.

I would also request, if you will, that my full statement and the background materials that we have prepared be included in the record.

The CHAIRMAN. Without objection, the entire package will be included in the record.

Ms. WINFREY. I know that you, Mr. Chairman, and others members of this committee, as you have indicated and have shown through your sponsorship of other bills, are concerned about the rights of victims of crime and abuse, and specifically child abuse. I also know that Senator McConnell and the various groups here today have played leading roles in efforts to protect our children.

I would like to introduce to you, if I can, two close associates of mine who have helped me research and prepare for today's testimony, a man who apparently needs no introduction to this group, he is "Mr. Popular" today, former Illinois Governor James Thompson, who I have retained as legislative counsel, my personal attorney, Jeffrey Jacobs, and Debbie Dimaio, my long-time producer and confidant.

As you all have indicated, you recognize, Senators, that our newspapers and television are full of daily reports about one of the most inhumane and destructive forces I believe at work in our Nation, and that is the physical, as well as the emotional, abuse of our children.

The available statistics say that there are more than 2.5 million reports of suspected child abuse and neglect each year in our coun-

try, many of these, as you all have said, by repeat offenders. But the experts tell me, and I know from my own personal experience and from the more than 4,000 pieces of mail I receive every week, and I have been receiving ever since I went public with my own history of abuse, that the statistics tell only part of this story.

There are millions upon millions of silent victims in this country that have been and will continue to be irrevocably harmed, unless we all here do something to stem this horrible tide. So, today I am here speaking out on behalf of children, the children who wish to be heard, but whose cries, whose wishes, whose hopes often, I believe, fall upon deaf or unattentive ears.

I am motivated, because I am a very spiritual person, I believe, and I think that it is just spiritual law that you cannot save a life, without uplifting your own. And every time you remove a child from an abusive home, every time we rescue a child from neglect, from emotional humiliation, we rescue a child from the dark side of life, every time we make the effort to make the difference, I know that we add light and healing to our own lives.

I also know this, that every time a child perishes, a little piece, a tiny almost invisible piece of society, a portion of our own humanity dies, and it does not really matter who the abuser is, the results are the same, a lost child, a delinquent child, an abandoned child, a child who feels no love and, therefore, begins to hate himself or herself, and inevitably, society, a child who turns to drugs or alcohol to try to blot out the pain, a child who turns to crime and hatred on the society, who did nothing to protect the once innocent. I know that children cannot stand alone. Roland Summit, a psychiatrist at UCLA, once said, "We cannot hold the lambs responsible to battle the wolves."

In 1986, Dr. Gene Abel, a clinical professor of the Department of Psychiatry at Emory University in Atlanta, completed one of the largest studies ever conducted of sex offenders, interviewed over 400 child molesters. They admitted to over 67,000 instances of child sex abuse, or an average of 117 child victims per molester.

Children cannot stand alone, and there is nothing, absolutely nothing that angers me more than to hear of a child who has been abused, assaulted or raped or murdered by someone who had previous convictions for child abuse, was able to plea bargain, released and came out to molest and murder somebody else's child.

That was Angelica Mena's story. I did not know this child. I had never heard her laughter. But I did hear her story on the evening news this past winter in Chicago. She was a little girl in Chicago, 4 years old, Hispanic. She had gone from the mother's apartment on the second floor to visit her aunt on the first floor, and in an hour, Angelica Mena disappeared. She was molested, she was strangled, she was thrown into Lake Michigan, in an hour, by a man in the adjacent apartment, a man who was a repeated, convicted child molester.

That night I had come up from work and was just passing my television set and saw the news story, and I wept. I wept for that child that I had never known, Angelica. I wept for her, because I realized that her muffled cries never reached her mother, who was just on the other side of the apartment, as her 4-year-old was being strangled by a repeated, convicted child molester.

And I wept for us, a society that says we care so much about the children, but apparently cares so little, that we would allow a man with two previous convictions for the kidnapping and rape of children to go free, after serving only 7 years of a 15-year sentence, to go free to kill an innocent 4-year-old girl on the other side of her mother's wall.

So, I vowed that night, and later while doing my television show with child advocate attorney Andrew Yachas, to try to do something, because for years I had done shows about it and talked about it and encouraged other people to do things about it, and I recognized that I was one of those people who was, too just paying lip-service. So, I vowed to take a stand for the children of this country.

Upon consulting with experts in the field and doing a lot of research, it became clear that pedophiles, as you all have mentioned here, seek employment where they will be in contact with children. They seek employment as camp counselors and babysitters and school bus drivers and day care workers, and they insidiously seek out access to children. That is what they do.

In 1990, nearly 6 million children received day care. This total is expected to grow to 8 million by 1995, and, despite this, there is still no reliable centralized national source through which child care organizations can obtain the benefit of nationwide, not State-to-State, but nationwide criminal background check on persons who provide or seek to provide child care.

The vast majority of child care workers and organizations, as we all have said, most people who take care of children take care of them because they love them, they care for them, and they are dedicated and they are concerned about the welfare of children.

I have learned that, tragically, there is no reliable way of screening child care workers for histories of child abuse and other serious crimes, so I hired legislative counsel to develop and draft national legislation on this issue, and a few weeks ago, as you know, I met with you, Senator Biden, and your staff to present our research and our ideas and to try to draft bill language, which has been more difficult than any political science class I ever went to.

I believe that, at a minimum, effective legislation to permit nationwide background checks on those who work with children should assure that crimes of child abuse are reported fully and accurately by all the States to a nationwide registry, so that convicted child abusers cannot gain access to children, simply by moving from State to State. Senator McConnell's bill addresses this issue in an effective manner.

Also, I believe it should establish national minimum standards to permit a wide range of child care organizations, including voluntary groups, to obtain the benefit of a background check on current and prospective child care workers for child abuse and also for other serious crimes.

It should establish procedures to protect the rights and the privacy of people whose backgrounds are being checked, including consent requirements and the right to correct inaccurate data.

Children cannot stand alone. None of us can. Any of us here who has made some successes in our lives, we are here because someone showed us the way.

When I was abused, I blamed myself. Unfortunately, I blamed myself for most of my adult life. Lots of people say you lose your innocence when you are sexually molested as a child. I know that you lose your childhood. And my heart goes out to the children who are first abused at home, and then have absolutely nowhere to turn to.

It would be, I think, inconceivable for us to force a rape victim to live with her rapist. Yet, countless children are forced to return to situations in homes where the abusers still lurk, without contrition, without remorse, and without any punishment. This to me is societal abuse. It makes me mad. It hurts.

So, I am committed to using all of my will now to follow through on this legislation and on the issue of child abuse. I am not just here for today. I intend to make this my second career, working as an advocate for the children. This is my first effort at the Federal legislative level to help protect children from child abuse. I intend to work and to lobby and to work on this issue with the same energy that I have devoted to my television career, and the Congress of the United States and the legislatures of the 50 States are going to be hearing from me and hearing from anyone else who cares to join me in this project for the weeks, months, and years to come.

I am blessed to be able to be in 20 million homes every day. I receive a lot of attention from that, a lot of support for that, and I believe that I can get millions of viewers to support legislation to protect the children.

I just want to say again, I thank you for holding this hearing today. I thank all the child advocacy groups who came here today.

I do believe that they are our children, and if each one of us in this room, those who hear these words and do not choose to make some kind of personal commitment to protect, to honor, and ultimately empower the children that we bring into this world, then we as a civilized society will eventually perish. I know that, and I thank you.

The CHAIRMAN. Thank you very much.

Let me begin by not focusing on the bill for a moment and focus on your last comment about dealing with your second career. I know you mean that from the bottom of your heart. Quite frankly, we have passed some fairly compelling legislation over the last decade that does not deal with the question, in addition to attempting to deal with the question of registering, if you will, having a registry where people can go to determine whether or not there is a convicted child abuser or convicted felon, and I want to just say to you publicly now that once, hopefully with our help, this becomes law, and once the President signs this, hopefully, and I have no reason to doubt that he would enthusiastically support such an effort, I would like to be able to have some time with you, as others would, to seek your help in dealing with legislation that has already been passed, but needs some real assistance, for example, expanding court-appointed special advocate programs, because many times these children end up in a court, and the courts are incredibly insensitive, understandably, in a sense, because of the volume.

There is a CASA program that is first-rate that I would like to call to your attention—I am not asking for commitment to any of

this now, but with your kind of help, you could generate so many people to be involved in that CASA program. Mr. Walsh knows about these programs.

Also, a bill that Senator Reid and I passed calls for training of judges and court personnel to understand the dilemma and the plight of the child sitting in the court room. We have changed the law relative to in what circumstance a child can confront his or her accuser, can confront the abuser, so to give the child more—we have heard a lot of testimony before this committee from abused children and also from psychologists and psychiatrists who have told us a great deal about what has to change in the system to accommodate a 5, a 6, a 7, a 10, a 12-year-old child sitting in the chair looking down across the way at mommy or daddy or the day care provider or the teacher, and being able to say, utter the words.

So, there is a good deal that has been done, but, quite frankly, I do not think we have been able—we passed this legislation, the Child Victims Protection Act, but I am not sure we have aroused the Nation.

Ms. WINFREY. So, what would you like me to do?

The CHAIRMAN. Well, what I would like to do is I would like you to be willing to sit with me and others and go through exactly what is in the legislation already——

Ms. WINFREY. All right.

The CHAIRMAN [continuing]. And seek your help, for example, as you make these tours around the country and on your program, focus on the need for these extra professionals, if you will, to go to court with a child and sit with a child and take the child through the process, not a lawyer, not a doctor, not a psychiatrist, who cannot afford that, the child cannot afford that, most times. There are many things, particularly the CASA program, I would like to talk with you about.

But you mentioned something that I would like you to amplify on, that goes beyond the detailed legislation, which I would only like to ask you three questions about, the details of the legislation that you have submitted to us for our consideration and that Senator Thurmond and I will be introducing.

You said something I don't think people understand very well, and that is the victim, the victim tends to blame himself or herself, whether it is a child that has been victimized, whether it is a woman that has been harassed, whether it is an individual who has been raped, people who are victimized by more powerful physical forces tend to, from all the testimony we have heard, tend to sit there and say, "Why me? What did I do?"

Ms. WINFREY. Well, do you know why that happens?

The CHAIRMAN. I would like you to talk about that.

Ms. WINFREY. Well, that happens, because I know of a case—and there are so many cases—I will not speak of myself right now, but I know of a case of a 6-year-old girl who was sexually abused, allegedly, by her father in the home, taken out of that home and put in foster care for several weeks, and then brought back into the home. Having been sexually abused myself at a very early age, the child—and experts will tell you this, too—the child cannot make the adult a bad person, because the child needs to depend on the adult, and part of the confusion and the horror of sexual abuse is

that many times it happen to children who have some trust in the person who is committing the offense.

In the mind of that little 6-year-old who is put back into the home, who is removed, who is lonely, who is hurt and sad, the mind of that 6-year-old child, daddy wasn't bad, or if it was an uncle or a cousin who is still in the home and had the home environment and the support of the family, that person isn't bad, the child believes that she is the one that did something wrong, and that is the message that society sends to the victim, because who got taken out of the house, who was punished, who got removed?

In my own life, the same thing happened to me. I was never removed from the home, but I blamed myself, because how could they be bad? How could they be bad? Even up until recently, which shows the ultimate destruction that it has on a lot of people's lives, have I been able to overcome so much. I am blessed—so many people are not—to be able to understand that they were not responsible, that they were not responsible, and it takes a lifetime for some people to work that out, because, in the child's mind, in the child's eye, how can they be bad? They are the people who are supposed to protect and love you.

The CHAIRMAN. What do you hope would be accomplished, if this nationwide check system were in place?

Ms. WINFREY. What I hope to be accomplished is that repeat offenders, repeat child molesters, people who, as we know, if someone is convicted and caught, the chances are they have done it hundreds of other times. My hope is we can stop repeat child molesters from having access to children in working environments, from child care organizations that provide specific child care to children.

The CHAIRMAN. Let's talk about mechanically how this bill would work, if it were law. If someone who had been convicted, not accused, but convicted at any time in the past of an offense that is deemed to have the potential of negatively impacting a child from a sex offense, to murder, to drug dealing, et cetera, if they are convicted and they, nonetheless, want to work in a day care center, for example, they would go in to apply, and at that point the day care center would hand them a form and say you've got to give us consent to get your criminal record, if any, is that correct?

Ms. WINFREY. That is correct.

The CHAIRMAN. It would seem to me that one of the ancillary benefits of this legislation would be that it would have a very chilling effect on these offenders even attempting to apply for the jobs in the first place.

Ms. WINFREY. I think it would have a chilling effect on some, but for many of these people, particularly people who are truly pedophiles, they think they can get away with it. I used to watch 60 Minutes all the time, with Mike Wallace interviewing people, and could never understand how the guys who are crooks would consent to an interview with Mike Wallace.

The CHAIRMAN. Some of us cannot understand how anybody could consent to an interview with Mike Wallace. [Laughter.]

That's a joke, Mike Wallace, if you are listening. Everyone laugh. I want to make it clear.

Ms. WINFREY. They do it, because they think they can out-stump Mike, and so I think a lot of these people, this is their lifetime

career, this committing crimes against children and they think they can beat the system. So, yes, I think it will stop some people from applying, and others it will not. It is not required of a child care organization, we are not saying that if you are a day care center, you have to do this.

What I would like to do is get the information out, once you all pass this bill, to let people know that the child care checks are available, that you can check the history and background of a person, but it is not mandated, you do not have to.

The CHAIRMAN. I suspect, if and when this becomes law, Ms. Winfrey, you will find most enthusiastic supporters of this will be the child care providers, because they would love to have the ability to be able to have this kind of check. We are going to hear testimony from leaders in that industry after you speak who are here to endorse this nationwide proposition.

Let me ask one more question, and then I will yield to my colleague, if I may. You have, in your bill that you proposed, built in several provisions that deal with the possibility that such a check could be mistaken——

Ms. WINFREY. Right.

The CHAIRMAN [continuing]. That someone may become victimized. There is no greater stigma in society, I suspect, than to be stigmatized as a child molester. You, in the bill that you presented to me, with the help of your counsel, provided for such provisions as an appeal procedure to correct any inaccuracy in background checks, and you further, as I indicated earlier, provide for the requirement of a consent form being signed before this can be done. Why do you think that is important?

Ms. WINFREY. Well, it is to protect the privacy and also I do not want to propose or help to create any kind of legislation that would violate a human being who had been inaccurately charged. Therefore, if you, Senator, are running a day care center and I came to you for employment and you said we have done a background check and we found that Oprah Winfrey, in Kentucky, was convicted of committing a sex crime against a child, I would say to you that you have got the wrong Oprah Winfrey, because I never lived in Kentucky, and the idea behind this is to allow people who could be wrongly accused to defend themselves.

The CHAIRMAN. At least, it would give them that opportunity to make the case.

Ms. WINFREY. Right.

The CHAIRMAN. I thank you very much. I would just like to point out that this background check system is not a novel idea. It has been in place in California since 1986. Just in the year 1990, they uncovered 3,016 individuals with criminal records. In Florida, it has been there since 1985, and in 1989-90, they got 1,043 people who applied for jobs. In Iowa, Senator Grassley's State, it has been in place since 1980-91 only for the State—you are proposing nationalization of this, as others have—and 47 people in 1991. In Minnesota, in 1991 it went in place, and 139 people thus far in 1990. In Texas, it was in place in 1985, and from September to August of 1990-91, they found 860 convicted felons applying for the job. And in the State of Washington in the year 1990 alone, 1,062 convicted

felons, with the system that we have now, which is not complete, applied for jobs.

So, this is an old idea—the States are ahead of us—that we can, with your recommendation, make very, very much better by making sure that you not only catch the record of the State in the State of Washington, but pickup, if there was a conviction in Kentucky or Delaware or South Carolina or everywhere else, and you add, I think, some additional procedural pieces to your proposal that make this by far and away the best proposal that we have had thus far.

I thank you, and I look forward to your announcement to run for public office any time soon.

I yield to my colleague.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I have a letter from Senator Dave Durenberger, dated November 8, 1991, on this subject, and, to save time, I ask unanimous consent that it be made a part of the record.

The CHAIRMAN. Without objection, it is so ordered.

[The prepared letter of Senator Durenberger follows:]

United States Senate

November 8, 1991

The Honorable Strom Thurmond
Ranking Member, Committee on the Judiciary
140 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Strom:

I am pleased that the Judiciary Committee has decided to hold a hearing on Tuesday, November 12, on legislation that would require a national registry of people convicted of crimes against children, for the purpose of background checks conducted by child care providers.

As you may know, this legislation is similar to the amendments that Senator Mitch McConnell and I attached to the 1991 Crime Bill. Senator McConnell's amendment creates a national registry of child abuse crimes. My amendment, the Crimes Against Children Registration Act, targets a particularly dangerous segment of child abuse criminals -- those who sexually abuse or exploit children.

My legislation would require people convicted of a sexual offense against a child to register a current address with law enforcement officials for 10 years after their release. This information would be accessible through statewide and nationwide computerized crime information networks, and may be used for confidential background checks by child care providers.

Each year, hundreds of thousands of children are the victims of sexual abuse and exploitation. There is strong evidence which indicates that the type of people who commit these offenses repeat their crimes again and again, to the point of compulsion. Tragically, these offenders seek employment by organizations that would give them legitimate access to children.

I am pleased that the Judiciary Committee has recognized the need for a national registry to protect children. I hope that the conferees on the 1991 Crime Bill will work to include Senator McConnell's and my legislation in the conference report, so that we can move quickly toward the implementation of this registry.

Thank you again for your interest in protecting America's most vulnerable and precious resource -- our nation's children.

Sincerely,

Dave Durenberger
United States Senator

The CHAIRMAN. I think it may be appropriate at the same time to introduce the statement of a member of this committee, Senator DeConcini, who could not be here today, who has written testimony.

[The prepared statement of Senator DeConcini follows:]

Dennis DeConcini

STATEMENT OF SENATOR DENNIS DeCONCINI ON THE NATIONAL CHILD PROTECTION ACT OF 1991

NOVEMBER 12, 1991

I want to commend the outstanding work of Senator Biden and Senator Thurmond in drafting an excellent bill which seeks to assure that our children are safe in child care facilities in this country.

Let me say up front that the vast majority of child care providers in America are responsible individuals who have the best interests of children at heart. But tragically, there are exceptions. Because there are exceptions, it is imperative that we put in place a national criminal records check for child care workers who work with young children.

As a former prosecutor, I have become convinced that this is a national need. In 1984, I was successful in appropriating $25 million to encourage the States to require national criminal records checks for their child care workers. The next year Senator Cranston and I proposed to continue this funding. Unfortunately, we were unable to persuade the House conferees to retain our provision in the final Fiscal Year 1986 Continuing Resolution. The Biden-Thurmond bill seeks to restore this vital safeguard.

During debate on the child care bill two years ago, I talked on the Senate Floor about a 16-month-old baby who died in

the home of a child care provider in Springfield, Virginia. The provider had given Ashley massive doses of an antidepressant drug to keep her quiet. Other parents had seen Ashley tied to a high chair, but said nothing. They said nothing because the child care provider had told them that Ashley was a Downs syndrome baby. After Ashley died, it was discovered that the provider had previously been convicted of abusing her own children.

It is too late to save Ashley. But with a national criminal records check in place, we have a chance to save other young lives. It is far too valuable a chance to pass up. I am pleased to be an original cosponsor of this bill, and I pledge to do all I can to see that it is enacted into law.

Senator THURMOND. Ms. Winfrey, again, it is a pleasure to have you here.

Ms. WINFREY. Thank you, Senator.

Senator THURMOND. I am going to ask questions very briefly, to save time, and I am sure you will answer them briefly. Would you please tell us what victims of child abuse go through as they mature, and how it affects their daily lives?

Ms. WINFREY. Well, I can really only speak for myself. As I was saying earlier, you spend a lifetime, many times, of blaming yourself. So much focus in this country is done on the actual act of molestation. What I know, Senator, is that the emotional abuse, the sense of distrust created in a child, the sense of hatred turn inwards created in the child can often lead to a life of despair, and until you work this out—we all have our own personal problems and things that manifest in our life that need to be worked out, but until you work it out, I think for many people it creates destructive patterns of behavior in their lives.

Some children run away from home. I did. Some people turn to lives of crime. I almost did. I was going to be put in a delinquent home, but, fortunately, it was too full and I was sent to live with my father, instead.

Some children turn on themselves. They turn to drugs and violence. Some people just end up in relationships where they allow themselves to be mistreated for the rest of their lives. Some people end up disliking themselves so much, that they go throughout their lives being destructive in ways that nobody really understood or understands that it came or resulted from the initial child abuse.

Senator THURMOND. Would you tell us briefly why you believe we need Federal legislation in this area?

Ms. WINFREY. Well, I think we, as a Nation, Senator, need to take a stand, because the way the law is right now, some States, as we have heard here today, have some very effective legislation in place right now. But if a person who has committed a sex crime against a child goes to one State where there is background checks, he can move to another State where there is not, and this national legislation, a national registry, I believe, would prevent child sex offenders from being allowed to move from State to State.

Senator THURMOND. There are many silent victims who will be watching this hearing on C-Span and on the news. Could you give these innocent victims any advice, and what would it be?

Ms. WINFREY. Well, as you said in your statement earlier, Senator Thurmond, there are so many millions, that I hope that right now they all recognize that they are certainly not alone. Child abuse is a horror in anyone's life, it is a horror in this society, but it can be healed, and I am here today to begin, hopefully, the healing process for many of the Nation's children.

Senator THURMOND. Should a national system authorize checks for those currently employed as child care providers?

Ms. WINFREY. Would you repeat that, please?

Senator THURMOND. Should a national system, and that is what you want to establish here, a national system——

Ms. WINFREY. Right.

Senator THURMOND [continuing]. Authorize checks for those currently employed as child care providers?

Ms. WINFREY. Yes, it could, but, again, we are not asking that child care organizations be mandated or required. That is not what I am asking—I think John may have something else to say about that—but it would allow current child care organizations to make background checks on those who are currently employed.

Senator THURMOND. The main thing you are after, of course, is repeaters, as I believe you said.

Ms. WINFREY. Absolutely.

Senator THURMOND. Now, many States have effective systems for conducting background checks. Should these proven systems be incorporated into the national system?

Ms. WINFREY. I think so, Senator. I think that, as was indicated, there are many States that have effective programs already. All I am asking is that each State be required to report to a national registry, so whatever is going on in your State, the fact that you have to report it to a national registry does not in any way hamper or affect what is happening in your particular State.

Senator THURMOND. We thank you for your appearance and your contribution.

Ms. WINFREY. Thank you.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Ms. Winfrey, I want to just say thanks to you, because I am frank to say that I am the grandfather of three grandchildren in day care centers, and somehow I do not think I was ever sufficiently aware whether they are actually checking as to who is taking care of those children.

I made a note to call each of my daughters, in three different States, to really check, while we are moving with respect to this legislation. But I think that your appearance and your support and your concern is literally alerting millions of parents around the country at this very moment, prior to the passage of any legislation, as to the extent of the problem.

I am frank to say to you that I was not that aware. Somehow, I was just confident that the right people were working in the day care centers. Those facts and statistics are incredible, and I want to say thanks. I think the legislation will move. I think we will enact it into law, and I think we all owe you a debt of gratitude for alerting not only the Members of Congress to the issue, but the American people, as well.

Thank you very much.

Ms. WINFREY. Thank you, Senator.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Let me thank you for testifying and for your leadership in this area.

I would refer to part of a statement that you made, "I believe at a minimum," and then you go on to say what you think effective legislation could and should include. Now, you wrote this legislation that is being introduced, and my question is whether or not you really think, deep down in your heart, in some respects, it ought to go further?

For instance, you told the story about Angelica Mensa. Obviously, that is very tragic. This legislation would not touch that at all,

in the sense that a person would not be able to have a background check on their neighbor.

Ms. WINFREY. Right.

Senator GRASSLEY. Do you propose that it be broader, and this is kind of a starting point?

Ms. WINFREY. Absolutely, Senator. As I said, I am here today, but you will be seeing me again. I believe that what we have proposed is doable now. As Senator Biden indicated, there are so many thousands of children who could be saved right now, if there were a national registry, but this is actually just the beginning. I think there needs to be a whole national plan of action, of which I am willing to sit at any time and discuss with any of you, for greater protection laws for our children.

Senator GRASSLEY. Parole has been abolished on the Federal level, but for child molesters who raped and killed, like the one who killed Angelica, parole is still possible under most State laws. Do you favor the elimination of parole for abusers of our children?

Ms. WINFREY. Yes, sir, I do. I favor the elimination of parole and the elimination of any kind of plea bargaining for crimes against children.

Senator GRASSLEY. You are rightly concerned about the children who are abused by parents and, yet, are returned to them. Once again, however, the bill does not address this situation. Are you suggesting a greater Federal role in this area, and, if so, what do you think the appropriate Federal role might be?

Ms. WINFREY. I am not sure at this time. This is a beginning plan of action for me. As I have stated, I intend to make this a second career. I intend to align myself with other advocacy groups who have been working at this, who are expert at it and who have been doing this kind of work for a much longer time than I have been physically involved. So, I believe that, together, we can come up with something that is meaningful, laws that are more effective in protecting the children, even in the home.

Senator GRASSLEY. Under this bill, a background check could be conducted only if the applicant gave written permission for such a check to be conducted. Do you believe that an employer would be justified in refusing to hire an applicant solely because he or she refused to permit a background check?

Ms. WINFREY. Yes, sir, I do.

Senator GRASSLEY. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Your testimony has been both eloquent and moving. I think it has impressed all of us and impressed a great many people who are out there watching.

First, just a comment. It is tied in with a lot of other things. Mental health research is still an area we are woefully behind on. If I or my relatives have cancer or diabetes or arthritis, we stand up and say we have to do research in this area. If any of us have mental problems, we do not stand up, there is a stigma, and so this area of mental health research has not received the attention it should.

Obviously, the problems are tied in with drugs and alcoholism, too, as well as a lot of other things, so that we have to keep in mind we are going to have to move on a lot of fronts, and we expect to hear from you as we move on these other fronts.

One housekeeping question that I ask you or the Chairman or Governor Thompson: What happens? The ABC day care center wants to check out someone. Do you check directly with the research center? Do you go through the local police, or how does that happen?

Ms. WINFREY. You go to the State. Each child care organization has to go to the State, and the State then checks.

Senator SIMON. OK. Then, finally, to a great extent, this still remains a hidden problem in our society, despite all the graphs and everything.

Ms. WINFREY. I know when Senator Metzenbaum was saying that he wasn't aware that it was this big of a problem, I don't think any of us truly are aware of how vast the problems are. The statistics that Senator Grassley revealed of one out of three women, I think from what I am hearing from women and men, that the statistics are not as accurate as we would even wish to believe that they are. I think it is overwhelming. I think if we were ever able to know in our society every person who had abused or sexually molested a child, it would blow our minds, literally blow our minds.

Senator SIMON. Now, obviously, your testimony today helps to make it less of a hidden problem, and what you have done in your shows.

Ms. WINFREY. But may I say this, Senator: I really do believe, because I have been conscious of the problem for many years, having been a victim myself, I think there really does need to be, and I am not really sure right now what that national plan of empowerment of children is. I am not really quite sure. This, as I said, is a first step for me. But I think a lot of us are aware that there is this problem, but there are so many people who say, oh, yes, this happened, but what can I do about it? I think raising the consciousness really isn't even my concern right now, because I think people do know. I want to be able to move people into doing something about it, lobbying you, lobbying their State and local governments for greater laws that will protect the children.

Senator SIMON. And in a very real sense, what you are offering today is one piece in a mosaic.

Ms. WINFREY. It is not only a piece, it is a tiny piece, it is a tiny piece. That is why I am hoping you all will pass it.

Senator SIMON. I think we will.

Ms. WINFREY. OK.

Senator SIMON. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Again, I want to thank you. There is much more to ask you, but at this point I think the thing that I think most of us will be asking you is for help in some of what has already been done and what is attempting to be done. For example, you mentioned the impact on children abused. Well, in the legislation that we passed, we provide an incredibly meager sum to treat the vic-

tims of child abuse, to give them some help once they are abused. As you know, many tend to become abusers.

Ms. WINFREY. Right.

The CHAIRMAN. You also are aware that we attempted in the bill that I drafted, and that passed the Senate several years ago but did not make it through what we call the conference of the House and Senate, that if a nextdoor neighbor, for example, knew that a child was being abused in the home, they have an affirmative obligation to report that.

Ms. WINFREY. I believe that, too.

The CHAIRMAN. Failure to do that I think should warrant a penalty, if it can be proven that they knew the child was being abused and did not report it to the authorities.

Ms. WINFREY. I believe that, too. I believe that if you know that it is going on, you know that it is going on and you do nothing, you say nothing, that you are a conspirator.

The CHAIRMAN. Well, there is much more to do. It is very much appreciated by us all, not only that you have weighed in on this part of the problem, but that you obviously are going to weigh in from here on out on this problem, and we appreciate it a great deal.

Senator Grassley.

Senator GRASSLEY. Because I have been involved with legislation on child pornography, I have one question I would like to ask, and it relates to this bill, as well.

The CHAIRMAN. Surely.

Senator GRASSLEY. The list of enumerated offenses required to be reported includes promotion of pornography. It seems that a plain reading of this indicates that only those indicted or convicted of illegal distribution of pornography would be reported to the national data base. Do you think that the national data base should also include information on those persons who are indicted or convicted for the illegal possession of certain forms of pornography including child pornography?

Ms. WINFREY. Oh, absolutely.

The CHAIRMAN. That is something we should consider.

Again, thank you very, very much.

Ms. WINFREY. I must say this is almost as good as the Oprah Winfrey Show. Thank you very much. [Laughter.]

The CHAIRMAN. I am sure not nearly as interesting.

[The prepared statement of Ms. Winfrey follows:]

Testimony of
Ms. Oprah Winfrey

"Protecting Children in Day Care:
Building a National Background"

before the
Committee on the Judiciary
United States Senate

November 12, 1991
Washington, D.C.

Mr. Chairman, Senator Thurmond and other distinguished members of this Committee. I would first like to thank you for holding hearings on the important issue of child abuse and for sponsoring and considering legislation to help protect our children.

I know that you, Mr. Chairman and other members of this Committee are very concerned about the rights of victims of crime and abuse. I also know that Senator McConnell and the various groups here today have played leading roles in efforts to protect our children.

I'd like to introduce you to three close associates of mine who have helped me research and prepare for today's testimony.

Former Illinois Governor, James Thompson, who I have retained as legislative counsel; my personal attorney, Jeffrey Jacobs; and Debbie Dimaio, my long-time producer and confidant.

Senators, our newspapers and televisions are full of daily reports about one of the most inhuman and destructive forces at work in our nation -- the physical and emotional abuse of our children. The available statistics say that there are more than 2-1/2 million reports of suspected child abuse and neglect each

year in our country, many of these by repeat offenders. But the experts tell me, and I know from my own personal experience and from the mail I have been receiving ever since I went public with my own history of abuse, that the statistics tell only part of the story. There are millions upon millions of silent victims in this country that have been and will continue to be irrevocably harmed unless we do something to stem this horrible tide.

I am speaking out on behalf of the children who wish to be heard, but whose cries, wishes, and hopes often fall upon deaf or inattentive ears.

I am motivated because I know it's spiritual law, you can't save a life without uplifting your own. And every time you remove a child from an abusive home, rescue a child from neglect, emotional humiliation, the dark side of life; every time we make the effort to make the difference, we add light and healing to our own lives. Every time a child perishes, a little piece, tiny, almost invisible piece of society, a portion of humanity dies.

It doesn't matter who the abuser is, the results are the same, a lost child, a delinquent child, an abandoned child, a child who feels no love and therefore begins to hate himself ... herself ... and inevitably society ... one who turns to drugs or alcohol to blot out the pain or to crime and hatred on the society who did nothing to protect the once innocent child. Children cannot stand alone. Roland Summit, a psychiatrist at UCLA once said "We cannot hold the lambs responsible to battle the wolves."

In 1984, Dr. Gene Abel, a Clinical Professor of the Department of Psychiatry at Emory University in Atlanta, completed one of the largest studies ever conducted of sex offenders, interviewing over 400 child molesters. They admitted to over 67,000 instances of child sex abuse, or an average of 117 child victims per molester.

Children cannot stand alone.

NOTHING, NOTHING, angers me more than to hear a story of a child being abused, assaulted, raped, murdered by someone who had previous convictions for child abuse, plea bargained, was released and came out to molest and murder a 4 year old who lived across the

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hall. That was Angelica Rena's story. I didn't know the child, never heard her laughter. But I heard her story on the evening news in Chicago this past winter.

A little girl in Chicago goes from her mother's home on the second floor to visit an aunt on the first floor, and in one hour disappears. Molested, strangled, thrown into Lake Michigan, in an hour, by a man in the adjacent apartment. A repeated, convicted, child molester.

I wept for the frightened Angelica whose muffled cries never reached her mother who was just on the other side of the wall, as her 4 year old was being strangled. And I wept for us, a society that cares so little about its children that we would allow a man with two previous convictions for kidnapping and rape of children to go free after serving only 7 years of a 15-year sentence, to kill an innocent little 4 year old girl.

So I vowed that night, and later while doing my show with Child Advocate Attorney, Andrew Vachss, to do something, to take a stand for the children of this country.

Upon consulting with experts in the field and doing extensive research, it became clear that pedophiles seek employment where they will be in contact with children -- as camp counselors, babysitters, school bus drivers and day care workers. They insidiously seek out access to children.

In 1990 nearly six million children received day care, and this total is expected to grow to 8 million by 1995. Despite this, there is no reliable, centralized national source through which child care organizations may obtain the benefit of a nationwide criminal background check on persons who provide or seek to provide child care.

The vast majority of child care workers and organizations are caring, dedicated and concerned about the welfare of children. I have learned that, tragically, there is no reliable way of screening potential child care workers for histories of child abuse and other serious crimes.

So I hired legislative counsel to develop draft national legislation on this issue, and a few weeks ago met with Senator

Biden and his staff to present our research, ideas and draft bill language.

I believe that at a minimum effective legislation to permit nationwide background checks on those who work with children should:

1. assure that crimes of child abuse are reported fully and accurately by all states to a nationwide registry, so convicted child abusers cannot gain access to children simply by moving from state to state. Senator McConnell's bill addresses this issue in an effective manner.

2. establish national minimum standards to permit a wide range of organizations who care for children--including voluntary groups-- to obtain the benefit of a background check on current and prospective child care workers for child abuse and other serious crimes.

3. establish procedures to protect the rights and privacy of people whose backgrounds are checked, including

consent requirements and the right to correct inaccurate data.

Children cannot stand alone. None of us can.

When I was abused, I blamed myself. I blamed myself for most of my adult life. You lose your childhood once you've been abused. My heart goes out to those children who are first abused at home and have absolutely no one to turn to.

It would be inconceivable for us to force a rape victim to live with her rapist, yet countless children are forced to return to situations and homes where the abusers still lurk without contrition, without remorse and without punishment. This, to me, is societal abuse and it makes me mad.

I am committed to using all of my will to follow through on this legislation and on the issue of child abuse.

This is my first effort at the federal legislative level to help protect children from child abuse. I will lobby and work on this issue with the same energy I devote to my television career, and the Congress of the United States and the legislatures of the

50 states will be hearing from us and anyone who cares to join us in this project for the weeks, months and years to come.

I thank you, Senators, for holding this hearing today, and thank the child advocacy groups who came here today.

They are our children, and if we, each one of us in this room, and those who hear these words, do not choose to make a personal commitment, to protect, to honor, to empower the children that we bring into the world, then we, as a civilized society, will eventually perish.

Thank you.

The CHAIRMAN. The next panel are people who have been in this field, Dr. Linda Williams, a professor of Family Research Laboratory, University of New Hampshire; Mr. Gordon Hardy, inspector general, Department of Human Services, State of Texas; Mr. Gordon Martin, Washington Representative for Kinder-Care Learning Centers, Inc., and La Petite Academy, two of the Nation's largest child care providers; and Mr. John Walsh, a man many of us know, a board member of the National Center for Missing and Exploited Children.

Then we will hear next from Senator McConnell, who has been involved in this legislation.

While they are being seated, let me point out a few additional facts about our witnesses. As I said, John Walsh is a board member of the National Center for Missing and Exploited Children, and a vocal advocate against child abuse. Mr. Walsh established the Adam Walsh Child Resource Center, after his son Adam was abducted and murdered. Mr. Walsh is also well known to this committee after his work on the Missing Children's Assistance Act of 1984.

Mr. Gordon Hardy is the inspector general of the State of Texas Department of Human Services. Mr. Hardy administers the Texas State criminal background check system, one of the Nation's model programs. Mr. Hardy has previously served as Director of Investigations and Regional Supervisor of Investigations for the Department of Human Services, as well as 11 years on the police forces of San Antonio and Tyler, TX.

Dr. Linda Williams is a professor at the Family Research Center of the University of New Hampshire, and over the past 18 years, Dr. Williams has been researching all aspects of sexual violence. She has authored a number of books, including the book entitled "Nursery Crimes: A Study of Sexual Abuse in Day Care," and she also has authored a number of articles. Dr. Williams has also served as Director of the Child Sexual Abuse Treatment Training Institute at the Joseph J. Peters Institute, in Philadelphia.

Mr. Gordon Martin, an attorney with the firm of Hogan & Hartson. He is testifying before the committee today on behalf of two of the Nation's largest day care providers and the National Child Care Association, the leading association of private licensed child care. These two companies, Kinder-Care and La Petite Academy, provide child care services for nearly every State in the Nation, with nearly 2,000 centers caring for over 720,000 children every day.

Why don't we begin from my left to right, and begin with you, Dr. Williams, and then with you, John, if that is OK.

Good morning, doctor, and welcome.

STATEMENT OF A PANEL CONSISTING OF LINDA WILLIAMS, RESEARCH ASSOCIATE PROFESSOR, FAMILY RESEARCH LABORATORY, UNIVERSITY OF NEW HAMPSHIRE; GORDON HARDY, INSPECTOR GENERAL, TEXAS DEPARTMENT OF HUMAN SERVICES; GORDON G. MARTIN, WASHINGTON REPRESENTATIVE, KINDER-CARE LEARNING CENTERS, INC., LA PETITE ACADEMY, AND THE NATIONAL CHILD CARE ASSOCIATION; AND JOHN WALSH, BOARD MEMBER, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN

Ms. WILLIAMS. Good morning. May I start with a statement?

The CHAIRMAN. Sure, please do.

Ms. WILLIAMS. I ask that be included in the record and I will summarize.

The CHAIRMAN. Your entire statement will be included in the record.

Ms. WILLIAMS. Thank you very much.

Mr. Chairman and distinguished colleagues here, I really appreciate your focusing on this important issue today, and thank you for your concern. I think it is very important.

I am Linda Williams, research associate professor at the Family Research Laboratory at the University of New Hampshire, and I am a sociologist. I have been working in this field for I guess it has turned into 19 years now, conducting research on the causes and consequences of sexual violence.

I have published several books and many articles, and I am currently the principal investigator of three projects that are funded by the National Center on Child Abuse and Neglect. I am also on the board of directors of the American Professional Society on Abuse of Children.

A number of horrifying cases of sexual abuse in day care came to public attention in the early 1980's. Since then, no community has been untouched by these types of allegations. In 1985, the National Center on Child Abuse and Neglect funded the Family Research Laboratory at the University of New Hampshire, to conduct a nationwide survey of these cases, to find out what was happening and what could be done to reduce the risk of abuse to children. I was the project director of that study, and authored a book, along with David Finkelhor, called "Nursery Crimes: Sexual Abuse in Day Care." A copy of the executive summary of the final report of the study which we submitted to the National Center on Child Abuse and Neglect has also been submitted to you and is here today.

We studied 270 cases of sexual abuse in day care settings that occurred in 1983 through 1985. These cases involved 1,639 children. We estimated that the cases we were looking at represented about one-half of all of the cases that occurred during that time period, and that 2,500 children under the age of 7 were involved in these reported and substantiated cases in that 3-year period. Now, I want to make clear here that these are only the reported and substantiated cases, and, again, it is the proverbial tip of the iceberg that we may be looking at.

However, we concluded that, although a disturbing number of children are sexually abused in day care settings, the children are not at increased risk for sexual abuse in these settings. Children

are just as likely to be sexually abused in their own homes, and that the number of children who are sexually abused in day care is a reflection of the large number of children in are—as we know, we see many in are today—and also a reflection of the relatively high risk for sexual abuse of children in any setting, and that is something that has been emphasized I think in the testimony that has already occurred today, that it is not just in child care settings that we need to be concerned about abuse.

Contrary to public impressions, also we found that most sexual abuse in day care involved one or two children being molested by a lone perpetrator, not tens or hundreds of children in one center. I did find, however, that children who were sexually abused in day care settings were more threatened, more coerced, more terrorized than in many other kinds of sexual abuse which I have studied.

And there were some children who were terribly abused. They were forced to abuse other children, they were forced to take drugs, they were forced to get involved in numerous sexual acts over a long period of time, and the children were threatened, threatened with death, threatened with the loss of life of a parent, threatened that their animals or pets or friends would be killed. This is a very disturbing kind of abuse.

The children manifested a variety of symptoms and problems. The most common problems are fears and sleep disturbances, and also the kinds of problems that children evidenced include regressive behaviors and sexualized behaviors. In 62 percent of the cases, there was some injury, some physical injury to a child. The children were most symptomatic, interestingly enough, when a care giver was involved in committing the abuse.

This goes to the question of the children's negative response and the blaming of themselves and the feelings of betrayal, when a child is abused by someone he or she knows or has affection for or cares about, such as a parent or a family member, or, in the case of the sexual abuse in the day care, the care giver, and that is considerably more disturbing to the child, that betrayal, that loss of trust and the feeling on the part of the child that he or she has done something wrong. Seventy percent of the cases of sexual abuse in day care did involve care givers, such as an aide, a teacher, a director.

Unfortunately for parents and professionals and governmental agents who want to identify dangerous child care facilities, we found that even centers with very well trained educated staff, and with very good reputations can easily be the sites of abuse of children. We also found that most people who abuse children in day care settings do not fit the stereotype of the child molester, that they do not fit the stereotype of the pedophile, 40 percent of the abusers were women, not all of the abusers in day care settings were the classic type of pedophile who is isolated, who has a sexual preference for children and so forth.

We did encounter some cases where the perpetrators did, however, have a history of prior abusive or anti-social behavior.

The CHAIRMAN. Excuse me, doctor. When you say "are abusers," are you talking only about sexual abuse?

Ms. WILLIAMS. I am in this case talking about sexual abuse specifically.

We did encounter some cases where the abusers did have a history of prior physically abusive or other kinds of abusive history or anti-social behavior, and if this had been known, it might have signaled that that was a high-risk individual to be screened out.

Of the perpetrators in our sample, 20 percent had a history of prior police contact, including 12 percent who had an actual criminal conviction. However, most of the arrests were for offenses that may not be as useful for screening purposes. They were for offenses such as driving while intoxicated and other offenses. Only 8 percent of the perpetrators were found to have an arrest record for a prior sex offense, and only 4 percent, half of those perpetrators had been convicted before for a prior sex offense.

One problem with examining the percentage of applicants for day care positions that have sex offenses is that the perpetrators with prior convictions were often in positions where criminal record checks would not have prevented the abuse. For example, in one case, a man with a prior sex offense conviction was operating an unlicensed, illegal day care center. Now, he would not have sent in for a criminal records check on himself, and if the State had known about his operation, he would have been shut down for other reasons and not obtaining the normal licenses.

Another man was a bus driver from a transportation company that was temporarily contracted by the day care facility to take children to a local pool, so it chose the breadth of individuals that can be involved in having contact with children and the need to be aware of checking the records of those individuals.

And in other perhaps more shocking cases, there were day care operators who knew of, but disregarded employees' prior criminal record for sex offenses. One day care director, a pastor in a church-run day care facility felt that he was giving the man a chance to rehabilitate himself and redeem himself, by allowing a convicted ex-offender to be the janitor in the facility that housed the day care center, and then he proceeded to abuse children in that center. People need to use the information that they have, too.

It has been suggested that criminal background checks will improve the safety of children and care, but it is clear from our study that the vast majority of offenders did not have criminal records, and so would not be detected.

However, I do agree that if this process identifies even a small number of persons who would target children for sexual victimization, then a considerable amount, there would be a considerable benefit in terms of reduction of trauma to children and to their families.

I think it is very important that we look at and advise people who are involved in making policy around criminal records checks, that it may be the owners and the operators of the day care facilities who are the perpetrators who are seeking access to children and that their records need to be checked.

Again, it goes without saying that most of the people who are involved in day care and who own and operate day care facilities are caring about children and are not perpetrators or abusers, but I think we need to be clear that it is not the employees that always need the checking, but oftentimes the directors, also the spouses and family members of day care operators are potential abusers.

In our case, about 25 percent of the abusers were the family members of day care owners and operators and providers. Oftentimes, if there is someone, a predatory pedophile, who wants to get access to children, he would encourage a wife, a spouse, a girlfriend to open up a day care facility, and then get access to the child that way, so we need to have those kinds of checks.

I also agree and I am glad to see that the proposed legislation would implement procedures which would account for and give consideration to the privacy, confidentiality and due process issues that face us here. These issues were well addressed in an article by Howard Davidson in "Dickinson Law Review" in 1985, and I provided the cite on that, because it is important to take those into consideration.

Also, any effort to improve procedures for obtaining criminal records checks for child care employees and for others caring for children should carefully balance these issues, and I think build in a mechanism for evaluating the effectiveness of this kind of procedure.

I think it is absolutely critical that when legislation is proposed and there has been a wealth of good legislation that has come out recently in terms of dealing with child care issues, the CASA program and so forth, and I have been aware of this through my long history in working in the field of child sexual abuse, that many good programs have come out of this committee and others. It is critical, though, that we build in enough funds and resources for evaluating those projects and to see what kind of effect they are having, how many people are they targeting and how many hits do you get, so to speak, what is the outcome, what is the accuracy, is it doing what we plan to do here.

It is also important, I think, that any effort to facilitate criminal background checks for child care workers be accompanied by efforts to guard against the possibility that such checks will foster complacency and over-confidence in the staff that have passed the screening.

I think it must be stressed to licensing officials and day care operators and law enforcement personnel and parents, too, that many day care abusers do not fit the pedophile stereotype, and most do not have criminal records. So, if Senator Metzenbaum is suggesting to his daughters that they be aware of the criminal records, there are some other things that need to be looked at in evaluating the adequacy of the care being given and whether one should be concerned about the possibility of abuse occurring.

Day care staff, I believe, should be screened on a broad range of background information, including signs of emotional problems, substance abuse, sexual difficulties, poor judgment and insensitivity to and punitiveness towards children. The risk of sexual abuse is reduced, we found, if parents have free access to their children and are involved in the day care facility, so parents involvement—and again, I suggest to Senator Metzenbaum and others that the parental involvement is critical to assuring quality day care and day care that is more likely to be free of both physical and sexual abuse of children.

More and better day care facilities are also needed. There are long waiting lists and limited services, and that forces parents to

stick with day care facilities in which they may not have the highest confidence.

I really do want to say that I applaud the efforts of the committee to consider ways to protect children in day care, and I do encourage you to consider a broad range of options for improving the availability of day care and improving the treatment of children in our system.

I would be happy to answer any questions you have about the impact of abuse or day care abuse, specifically.

Thank you.

[The prepared statement of Ms. Williams follows:]

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Senate Judiciary Committee Hearings
Protecting Children in Day Care: Building a National Background Check System
November 12, 1991

I am Dr. Linda Williams, research associate professor at the University of New Hampshire's Family Research Lab. I am a sociologist and for the past 19 years I have conducted research on the causes and consequences of sexual violence. I have published several books and many articles and I am currently the principal investigator on three research projects funded by the National Center on Child Abuse and Neglect.

A number of horrifying cases of sexual abuse in day care came to public attention in the early 1980's. Since then, no community has been untouched by these allegations. In 1985 the National Center on Child Abuse and Neglect funded the University of New Hampshire's Family Research Laboratory to conduct a nationwide survey of these cases to find out what was going on and what could be done to reduce the risk of abuse to children. I was the project director for this study and authored a book with David Finkelhor: Nursery Crimes: Sexual Abuse in Day Care. A copy of the executive summary of the study is available here today.

We studied 270 substantiated cases of sexual abuse in day care settings in 1983-85. These involved 1639 children. We estimated that these represented 1/2 of the cases for the three year period and that over 2500 children under 7 years of age were involved in reported and substantiated cases of sexual abuse during that time. We concluded that although a disturbing number of children are sexually abused in day care, children are not at increased risk for sexual abuse in these settings. Children are just as likely to be abused in their own homes. The number of children sexually abused in day care is a reflection of the large number of children in care and the relatively high risk of sexual abuse to children in all settings.

Contrary to public impressions, most sexual abuse in day care involves one or two children and a lone perpetrator, not mass abuse of hundreds of children. We found, however, that children sexually abused in day care were more threatened coerced and terrorized than in many other kinds of sexual abuse. These children manifested a variety of symptoms and problems, the most common if which were fears and sleep disturbances. Regressive and sexualized behavior were also frequent. In 82% of the cases at least one child sustained a physical injury. Children were most symptomatic when the abuse involved caregivers (e.g., teachers as opposed to outsiders.)

Unfortunately for parents, professionals, and governmental agents who want to identify dangerous child care facilities we found that facilities with very well-trained and educated staff and with good reputations can just as easily be the sites of abuse. And most people who abuse children in day care do not fit the stereotype of child molesters.

We encountered many cases in which perpetrators had a history of prior abusive or anti-social behavior that, had it been known, would have signaled that this is a high risk individual. Of the perpetrators in our sample 20% had some prior police contact, including 12% with an actual criminal conviction. However, most of these arrests were for offenses such as driving while intoxicated, which might only be moderately useful for screening purposes. Only 5% were found to have had a prior sex offense arrest and 4% a prior sex offense conviction. Also, the perpetrators with prior convictions were often in positions where a criminal background check would not have prevented the abuse. For example, one man with a prior sex offense conviction was the operator of an unlicensed, illegally operating day care facility. Another was the bus driver from a transportation company contracted by the day care facility to take the children to a local pool. In other cases the day care operators knew of, but disregarded the employee's criminal record.

It has been suggested that criminal background checks will improve the safety of children in care. It is clear from our study that the vast majority of offenders did not have criminal records. However, if this process identifies even a small number of persons who would target children in care for sexual victimization, considerable benefit in terms of reduction of trauma to children and families will be attained. But procedures for criminal background checks need to take into account issues of privacy, confidentiality, and due process. These issues and others are addressed by Howard Davidson in an important article to which I would refer you. (see: Davidson, "Protection of Children Through Criminal History Record Screening: Well-Meaning Promises and Legal Pitfalls," 89 Dickenson Law Review, 577, 1985.) Any effort to improve procedures for obtaining criminal records checks for child care employees should carefully balance these issues and also build in evaluation of its effectiveness.

It is important that any effort to facilitate criminal background checks for child care workers be accompanied by efforts to guard against the possibility that such checks will foster complacency and over-confidence in staff who have passed the screening. It must be stressed to licensing officials, day care operators, law enforcement personnel, and parents that many day-care abusers do not fit the pedophile stereotype and most do not have criminal records. Day care staff should be

screened on a broad range of background information, including signs of emotional problems, substance abuse, sexual difficulties, poor judgement, and insensitivity and punitiveness to children.

The risk of abuse is reduced in facilities where the parents have easy access to their own children and where they are involved in the day care program. More and better day care facilities are needed. Long waiting lists and limited services force parents to stick with centers with which they are often unhappy. I applaud the efforts of this committee to consider ways to protect children in day care and encourage you to consider a broad range of options for improving the availability of safe, high-quality care.

The CHAIRMAN. Thank you very much, doctor. As you implied, our intention is we do not believe we can do all, but that we should do something. We do not believe we can catch everyone in the net who is an offender, and we want to make sure that we do not. One of the things that Senator Thurmond and I feel strongly about is that we not over-promise what a particular piece of legislation can or will do, but this we believe can do some very positive things.

To that extent, let me let Mr. Hardy, who has been dealing with a similar program in his State, testify, if you would, and to the extent that you can summarize your statement, Mr. Hardy, the more chance we will get to have some exchanges, as we go down the line.

STATEMENT OF GORDON HARDY

Mr. HARDY. Thank you, Mr. Chairman and Senators. It is a pleasure to be here today and talk to you a little bit about what we have experienced in Texas.

Our legislature gave us authority to check potential contact persons in the child care industry in 1985, and we basically limited to offenses against the family, the person in decency and drug related offenses. So, we do not screen into that——

The CHAIRMAN. Excuse me, Mr. Hardy, would you pull the microphone closer? The acoustics in this room are not the best.

Mr. HARDY. I will try to speak into it a little more closely.

We do not screen what we consider to be unnecessary offenses, in looking at people who are going to be having direct contact with children. As you mentioned, early in 1981, we did detect some 860 people who had offenses in those areas. I might point out that was out of a total number screened of 115,000-plus, so our experience does not indicate that our people trying to work in day care have been convicted of offenses. On the contrary, about three-quarters of 1 percent, but in that three-quarters of 1 percent are some fairly astounding backgrounds.

I do have a packet of material with some statistics that you may have, if you are interested in a little more detail.

The CHAIRMAN. We are very interested, and we will include it with the record.

Mr. HARDY. We feel that one of the important phases of a successful program is the actual working of a relevant match, and the way that happens is a paper trail that goes out to the facility and then comes back in feedback. We put the facility on notice that they have hired or are about to hire someone who has a relevant criminal history, and that they would not be in compliance with our rules if they continue that employment, without doing some things to resolve that.

One of the very first is to confirm that this is, in fact, the person whose criminal record we have accessed, so we point out right away that if the person disputes that they are the same person mentioned in the criminal record, to send us a thumb print. A thumb print is quickly and effectively and accurately used to resolve any mismatches. If the person has, in fact, been arrested or convicted, then the day care operator is provided a list of options that they may begin to exercise to help them evaluate whether or

not this person should be allowed to continue to work or whether this person would pose a risk.

I have also attached copies of the three most popular forms that we use for that to this hand out material. That is a key piece of the success in that it assures ownership of the facility in helping make those decisions.

As I said, we screen 115,000 to 120,000 people a year by our computer, an automated tape-to-tape match that is limited to Texas criminal history records only. Newcomers to our State who have not lived there more than 3 years, we submit a full fingerprint card to the FBI and pay the fee of $23 each to have those people checked. I have also got some numbers on those checks.

So, we would say that the biggest issues are that we lack automated access to the national criminal records system that already exist. In border cities such as Texarkana or Beaumont or El Paso, it is extremely difficult to know whether or not the person you are screening has, in fact, ever crossed into another State, or in this mobile society today, for that matter, gone farther, and a master criminal conviction history that would be very interesting to a potential employer or to our professionals who regulate these child care facilities. So, we would encourage a look at that.

We think that States who have been using these kinds of systems in the past years have clearly demonstrated that they know how sensitive this information is, that they know how to use it in a sensitive manner, that they know how to help people through a mistake in identities, and that they know how to treat confidential and not disseminate it. Keep in mind that the information we are talking about is not the nitty-gritty case details. It is only the offender's name, the arresting authority, the dates, the final outcome, if there has been one, and that kind of statistical criteria.

It might also be of value to consider looking into the several State registries, where child abuse investigation information goes that does not result in court action in criminal cases. Those systems are even more loosely woven together than are criminal histories from the various States. Some of those registers are even localized at the county level, when it is a county administered program in some of the other States.

With that, sir, I will stop and answer any questions you might have.

[The prepared statement of Mr. Hardy follows:]

Texas Department of Human Services

[redacted]

[redacted]

November 8, 1991

The Honorable Joseph R. Biden, Jr., Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Biden:

Commissioner Burton Raford regrets that a last minute crisis prevented him from being here today. He asked me to extend our full cooperation in support of this committee's efforts to protect children.

We welcome your invitation to testify about the positive results we have experienced with our system for criminal history screening of people involved in child care.

We hope that our comments and the attached materials will help you accomplish your goal of reducing risks to our children nationwide.

You may reach me at (512) 450-4210 for additional information after today.

Sincerely,

Gordon Hardy
Inspector General

John H. Winters Human Services Center • 701 West 51st Street
Central Office Mailing Address: P.O. Box 149030 • Austin, Texas [redacted]
Telephone (512) 450-3011 • Call your local DHS office for assistance

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THE TEXAS PROCESS

The Texas Legislature authorized our agency to screen the criminal history of people involved in child care in 1985. Our access authority is limited to these offenses:

- a felony or misdemeanor offense against the person,
- a felony or misdemeanor offense against the family,
- a felony or misdemeanor offense of public indecency, or
- a felony drug offense.

A copy of our state statute is attached for your convenience.

A TYPICAL YEAR

During State Fiscal Year 1991 (ending August 31) we screened 115,333 people against Texas Department of Public Safety criminal histories by way of an automated tape match. Our access to criminal history information via computer is limited to Texas records ONLY. Of that number, 860 had relevant criminal history matches. Those 860 matches can be analyzed as follows:

328 involved offenses against persons

18 involved offenses against the family

30 involved offenses against public indecency

484 involved drug offenses

The status of those 860 arrests were as follows:

219 convicted

33 probation

86 on bond/bail

522 no disposition

We also screened 309 "new arrivals" by submitting a fingerprint card to the FBI that resulted in 9 relevant matches during 1991.

WORKING A RELEVANT MATCH

Relevant Matches are directed to the facility for action. The three standard sheets used are:

Criminal History Feedback Form: (notifies the facility, provides feedback to our agency about the action taken)

Facility Action Needed (a guide that helps the facility operator through each relevant match)

Proof of Rehabilitation Documentation (Ensures facility ownership - helps document basis of their decisions)

Copies of these sheets are attached for your information.

ISSUES

States are prohibited, by FBI regulations, from access nation wide criminal history information by computer.

states may get nation wide criminal history information by submitting a complete fingerprint card on the person, paying a fee of $23 each and waiting six to eight weeks for a response.

Child abuse/neglect information, from central registeries such as CANRIS, are almost impossible to access because:

most are protected by state confidentiality laws

each state (or county) must be contacted individually by phone or mail.

TEXAS

Human Resources Code

§ 22.008. Access to Criminal History Information Records

(a) The department is entitled to obtain criminal history information records maintained by the Department of Public Safety, the Federal Bureau of Investigation identification division, or another law enforcement agency to investigate:

(1) owners and employees of, and applicants for employment at, a child-care facility licensed, registered, or certified or applying for a license, registration, or certification under Chapter 42 of this code;

(2) residents of a registered family home, excluding children in the home's care and the parents of the children;

(3) a person providing or applying to provide adoptive or foster care for children in the care of the department;

(4) a department employee who is engaged in the direct delivery of protective services to children on the date the department implements this section;

(5) a person applying for a position with the department, the duties of which include direct delivery of protective services to children;

(6) a volunteer or person applying as a volunteer with a local affiliate in this state of Big Brothers/Big Sisters of America or of a program known as "I Have a Dream/Houston";

(7) a person employed by a business entity which provides in-home respite care of children with temporary illnesses; or

(8) a person employed by a home health agency.

(b) The department may not use the authority granted under this section to harass an employee. The board shall adopt rules relating to the request and use of criminal records that are designed to prevent the harassment of an employee.

(c) The department shall establish a uniform method of obtaining criminal history information records. The uniform method must require the department to submit to the Department of Public Safety or to another law enforcement agency either a complete set of fingerprints or the complete name of each person being investigated. If the department submits the fingerprints of a person being investigated and relevant information is not obtained at the state or local law enforcement agency level, the department may submit the fingerprints to the Federal Bureau of Investigation identification division.

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(d) A law enforcement agency may not provide to the department the criminal history information records of a person being investigated unless the criminal history information records relate to:

(1) a felony or misdemeanor classified as an offense against the person or the family;

(2) a felony or misdemeanor classified as public indecency; or

(3) a felony violation of any statute intended to control the possession or distribution of a substance included in the Texas Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes).

(e) The department may release information obtained under this section to:

(1) the person being investigated; and

(2) a child-care facility that employs or is considering employing a person covered by Subsection (a) of this section.

(f) All criminal history information records received by the department are privileged information and are for the exclusive use of the department and those persons authorized under this section to receive the information. Except on court order or with the consent of the person being investigated, the records may not be released to any other person or agency. The department may destroy the criminal history information records after the records are used for the purposes authorized by this section.

(g) A person commits an offense if the person releases or discloses any information received under this section without the authorization prescribed by Subsection (f) of this section. An offense under this subsection is a Class A misdemeanor.

(h) The department shall adopt rules governing the custody and use of information obtained under this section.

(i) The department may charge a reasonable fee sufficient to recover the costs of obtaining criminal history information records authorized by Subsection (a)(7) or (a)(8) of this section.

CRIMINAL HISTORY FEEDBACK FORM

Region:_____ Lic. Rep:_____ Date_____

Name of Matched Person:_____

D.O.B. of Matched Person:_____

Name of Facility:_____

Type of Facility:_____

City:_____

Please Circle: Is person employed? Yes No

Applicant for employment? Yes No

RFH Household Member? Yes No

Offense	Date of Offense	Disposition

Facility Action:

Person Dismissed___ Person not Hired____ Variance Granted___

Variance Denied:___ Mismatch____ Registration Denied____

Application/Registration Withdrawn____

Additional Comments:

Facility Action Needed

The attached information indicates that you may have on your staff or in your household a person who has a criminal background. FEDERAL REGULATIONS PROHIBIT YOU FROM GIVING A COPY OF THE ATTACHED TO THE PERSON NAMED.

It is possible that the person named on the attached is not the same person. If this appears to be the case, it will be necessary for you to see that the person submits THUMBPRINTS so that this information can be clarified. To do this, your licensing office will provide you with a fingerprint card which must be taken to a place where qualified persons can take the thumbprints (police, sheriff, Department of Public Safety). Only the thumbprints are needed. You must then take or send the thumbprint card to your licensing office where it will be processed.

If the name on the attached information is your employee or member of you household and no final disposition is given under the heading "Disposition," you must follow-up the matter to determine what the final disposition was. The speediest and most dependable way to do this is to contact the District Clerk in the locale where the charge was made. They can tell you if there was a conviction or not. If they find no record, you may assume there was no conviction and no further action is necessary. You should also discuss this with the individual as they may have relevant information and documentation.

If the person is your employee or applicant for employment or member of your household and the attached information reflects a conviction, OR, you determine that there was a conviction, the continued presence of this person in your child care facility is a violation of the minimum standards.

You must remove this person from your facility while children are in care OR you may request a variance of the standard which prohibits persons with certain convictions from being present.

TO REQUEST A VARIANCE, contact your licensing office and request that they send you a WAIVER/VARIANCE form which you must fill out. Attach to that form as much of the information listed on the following page as you can obtain. After you return the form and the other information to the licensing office, they will forward it for consideration and final decision. Please be assured that we will handle your request as quickly as possible. We recognize the need for your facility to experience as little disruption as possible.

REMEMBER, each time you have a new employee or other adult in your child care facility, WITHIN TWO WEEKS you must submit a Form 1977 for a background check on that person.

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PROOF OF REHABILITATION DOCUMENTATION

The variance request must establish that the person has been rehabilitated to the extent that his behavior is not a substantial risk to children. The licensee, registrant, or applicant attaches to the request as many of the following items as can be obtained:

1. Copy of the record of conviction;

2. If the person was in prison, include the following:

   a. copy of local, state or federal release order;

   b. information related to the length of time since the person was released from prison and free of any convictions;

   c. terms and conditions of parole.

3. If the person was given a probated sentence, the terms and conditions of the probation;

4. The nature of the crime and the seriousness;

5. The extent and nature of the person's past criminal activity;

6. The person's age at the time of the offense;

7. The amount of time that has elapsed since the person's last criminal activity;

8. The person's conduct and work activity before and after the criminal activity;

9. Evidence of rehabilitative effort during and after imprisonment.

10. Other evidence of the person's current fitness, including letters of recommendation from law enforcement, prosecution, and correctional officers who arrested, prosecuted, or had custodial responsibility of the person; the sheriff, or chief of police in the community where the person lives; and any other people in contact with him;

11. Documentation substantiating that the person has maintained a record of steady employment, has supported his dependents, has maintained a record of good conduct, and has paid all outstanding court costs, supervision fee, fines and restitution as may have been ordered.

12. Information related to the person's job responsibilities as an employee, plans for his supervision and hours & days of duty.

The CHAIRMAN. Thank you, Mr. Hardy.

Senator SIMON. Mr. Chairman, I am going to have to leave at noon, and there is one question I would like to ask Mr. Hardy, if I could.

The CHAIRMAN. Yes.

Senator SIMON. This legislation does not include the use of fingerprinting. You have obviously used fingerprinting in Texas.

Mr. HARDY. Yes.

Senator SIMON. Do you think the use of the addition of such a requirement would strengthen the accuracy of what is done?

Mr. HARDY. Not necessarily, sir. It makes it much more cumbersome and costly. Fingerprint check is normally a manual process. The fingerprint should be used as a backup to resolve any disputes.

Senator SIMON. OK.

Mr. HARDY. I think the automated system is by far superior in terms of low cost, and the delicate handling of anyone who says this is a mistake, get a thumb print, get it at the local or State police, get resolution and you have got it.

Senator SIMON. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Martin.

STATEMENT OF GORDON G. MARTIN

Mr. MARTIN. Mr. Chairman, I would like to commend you for holding this hearing today and for your leadership and Ms. Winfrey's leadership in the establishment of a reliable, centralized national source through which organizations like the ones I represent may access a nationwide criminal background check on persons who seek to become caregivers.

Our goal is to provide safe, quality, affordable child care to those who need it. The safety and health of the children in our care is our No. 1 concern. We strongly support any measure which will help us to better insure the safety and health of the children in our care.

At the same time, I do not want my appearance here today to be construed as indicate that we believe that child abuse in licensed child care centers is a major problem. All indications are that it is not.

I do not have the exact statistics, but I have read on more than 1 occasion that the incidence of child abuse in child care center settings, and this may include non-licensed centers, is in the neighborhood of one-half of one percent. In other words, approximately 99.5 percent of child abuse takes place outside of child care center settings. Granted, one case of abuse is one too many, but I think it is important to reassure parents that, with only a very few exceptions, their children are safe in our Nation's licensed child care centers.

We also think it is important to be realistic about what a nationwide background check system can accomplish, and this has been alluded to earlier. Although no one knows for sure, I would venture to say that the vast majority of abusers have never been arrested, much less indicted or convicted of a crime, and, therefore, would not appear in the national background system. We believe the Fed-

eral Government would be wise to commit some resources to prevention, treatment, awareness and other training for parents, children and care-givers.

I also would like to point out that the Nation's licensed child care centers are required by State law to report child abuse which takes place outside the center, so we ourselves are probably responsible for identifying a significant number of child abusers.

The groups I represent have had an opportunity to review an initial——

The CHAIRMAN. Would you clarify that? Do you mean if a child tells a care-provider in Kinder-Care in Mississippi or wherever you have a place——

Mr. MARTIN. Right.

The CHAIRMAN [continuing]. That, by the way, daddy or mommy or Uncle Harry or the guy down the street or the bus driver did something bad to me on the way to school or did something bad to me after school, that you then would report that and are required to report that to the local authorities, is that what you are saying?

Mr. MARTIN. Yes, sir, and not just if they tell us, but if we see physical signs of abuse or we suspect abuse, then we are required by State law to inform the State authorities.

The CHAIRMAN. The same exists regarding emergency care facilities. We had doctors testify here, though, that because it is so cumbersome, many emergency care facility providers do not err on the side of reporting what they think might be, in fact, abuse. They just do not do it.

Mr. MARTIN. In fact, the groups I represent would terminate—and it is in the handbook—would terminate an employee who failed to report an abuse situation.

The CHAIRMAN. That is encouraging.

Mr. MARTIN. As often is the case with legislation at this stage of the process, we have a number of questions, particularly with regard to how the legislation will be implemented, suggestions for the committee's consideration.

At the outset, let me say that we believe the proposed National Child Protection Act is a marked improvement over the National Child Abuser Registration Act, which I understand is currently in conference committee. The National Child Protection Act improves upon the National Child Abuser Registration Act, by including, among other things, much needed specificity on background check procedures, child abuser studies, Federal aid to States to computerize their records, and a more expansive definition of background check crime.

One of our concerns relates to the procedures the child care organization must follow, when the accuracy of a background check is challenged. Under the draft legislation, if we received a background check indicating that an employee had been convicted of child abuse, we could not terminate that employee, pending the validity of the background check. While we sympathize with anyone who might be the victim of an erroneous background check, the way this subsection is written, it assumes that the background check is erroneous. We believe it is more logical to assume that the background check is correct, with thorough and prompt procedures to challenge the background check's validity.

This subsection places too great a burden on the child care organization. As a practical matter, it is extremely difficult to insure that a caregiver will not have unsupervised care access to children in a child care setting. We would support language requiring a child care organization to reinstate an employee in the first available opening, if an individual was found not to have been indicted or convicted of a background check crime. We believe that if we err, we should err on the side of the safety of the children.

We strongly urge that a provision be added to the legislation holding harmless child care organizations that take adverse action against a caregiver on the basis of a background check. Again, we are not opposed to safeguards to protect the caregiver, once the background check is found to be erroneous.

Another of our concerns relates to the time allowed for the State designated office to respond to a background check. We think 20 business days is too long. We understand that the legislation must weigh the needs of the child care organization against the capabilities of the State designated office, but we believe the turn-around time needs to be shorter, perhaps something like 10 business days.

We would be disingenuous, if we did not express our concern about the cost of background checks. Any costs which we incur will ultimately be passed onto our customers, families struggling to provide care for the children. I can tell you that we lose children, when our costs go up even a little bit. If the cost is borne by the potential employee, this adversely affects recruitment. We do not have a solution to this dilemma, but we ask that the committee take the cost factor into consideration, as the legislation is refined.

On a more positive note, I would like to commend you, Mr. Chairman, and Ms. Winfrey, for making the legislation applicable to all child care organizations, regardless of whether they are regulated by the State. Too often, we have one standard of safety and health for children in licensed care, and a lower standard for children in non-licensed care. We would like to reiterate our long-standing support for the State regulation of all child care settings, and applaud your recognition of the fact that our children deserve a minimum level of safety and health, regardless of the child care setting the parents choose.

Thank you again for giving us the opportunity to testify today. We look forward to working with the committee to craft a bill that will provide a national system for accurate, up-to-date information on child abuse crimes. I would be happy, after Mr. Walsh's testimony, to answer any questions that you may have.

[The prepared statement of Mr. Martin follows:]

Testimony of

Gordon G. Martin

Washington Representative
Kinder-Care Learning Centers, Inc.
La Petite Academy, Inc.
and
The National Child Care Association

before the

Committee on the Judiciary
United States Senate

on

Draft Legislation to Combat Child Abuse

November 12, 1991

Mr. Chairman and members of Committee, my name is Gordon Martin. I am an attorney with the Washington law firm of Hogan & Hartson. I represent Kinder-Care Learning Centers and La Petite Academy, the nation's two largest private, proprietary child care providers. I also represent the National Child Care Association. My remarks this morning reflect the sentiment of all of these organizations. First, I would like to tell you a little about the groups I represent. Kinder-Care has been the child care field for over twenty years. Today, Kinder-Care's approximately 20,000 employees are licensed to care for more than 140,000 children every working day in 1,244 child care centers in 800 cities in 40 states. La Petite, which also has provided our nation's children with quality child care for more than two decades, operates 770 centers in 33 states. La Petite's 12,000 teachers, directors, and staff care for over 80,000 children ranging in age from a few months to 12 years. The National Child Care Association (NCCA) is the leading association of private child care centers and preschools. NCCA is a coalition of state associations. Most of its members are small business proprietors or single-center operations. Accompanying me this morning is Ms. Miriam Liggett, Kinder-Care's District Manager for Northern Virginia. Ms. Liggett will be available to answer any questions regarding how the current state background check system works in the field. Virginia has a mandatory background check.

Mr. Chairman, I would like to commend you for holding this hearing today, and for your leadership in the establishment of a reliable, centralized national source through which organizations like the ones I represent may access a nationwide criminal background check on persons who seek to become care-givers. Our goal is to provide safe, quality, affordable child

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care to those who need it. The safety and health of the children in our care is our number one concern. We strongly support any measure which will help us to better ensure the safety and health of the children in our care.

At the same time, I do not want my appearance here today to be construed as indicating that we believe that child abuse in licensed child care centers is a major problem. All indications are that it is not. I don't have the exact statistics, but I have read on more than one occasion that the incidence of child abuse in child care center settings (and this may include non-licensed centers) is in the neighborhood of one-half of one percent. In other words, approximately 99.5 percent of child abuse takes place outside a child care center setting. Granted, one case of abuse is one too many, but I think it is important to reassure parents that, with only a very few exceptions, their children are safe in our nation's licensed child care centers. We also think it is important to be realistic about what a nationwide background check system can accomplish. Although no one knows for sure, I would venture to say that the vast majority of abusers have never been arrested, much less indicted or convicted of a crime, and therefore would not appear in the national background system. And this system is not inexpensive. We believe that the Federal government would be wise to commit some resources to prevention, awareness, and other training for parents, children, and care-givers. I would also like to point out that the nation's licensed child care centers are required by state law to report child abuse which takes place outside the center, so we, ourselves, are probably responsible for identifying a significant number of child abusers.

The groups I represent have had an opportunity to review an initial draft of your National Child Protection Act, and fully support your overall efforts. As often is the case with legislation at this stage in the process, we have a number of questions, particularly with regard to how the legislation will be implemented, and suggestions for the Committee's consideration.

At the outset, let me say that we believe the proposed National Child Protection Act is a marked improvement over the National Child Abuser Registration Act (Title 36 of the Senate-passed version of the omnibus crime package), which I understand is currently in a conference committee. The National Child Protection Act improves upon the National Child Abuser Registration Act by including, among other things, much-needed specificity on background check procedures, child abuser studies, federal aid to states to computerize their records, and a more expansive definition of "background check crime."

While we strongly support the overall thrust of the legislation, we do have some concerns. One of these concerns relates to which state agency we would contact to request a background check. We believe the legislation should encourage states to establish procedures enabling the child care organization to make its request for a background check through state child care licensing personnel. We believe this "one-stop shopping" is the most efficient and effective way to handle background checks.

Another of our concerns relates to the procedures we child care organization must follow when the accuracy of a background check is challenged. The draft legislation at

section 5(F) requires "that no qualified entity may take action adverse to a provider, except that the qualified entity may choose to deny the provider unsupervised access to a child to whom the qualified entity provides care, on the basis of a background check....." In other words, if we received a background check indicating that an employee had been convicted of child abuse, we could not terminate that employee, pending the validity of the background check. While we sympathize with anyone who might be the victim of an erroneous background check, the way this subsection is written, it assumes the background check is erroneous. We believe it is more logical to assume that the background check is correct, with thorough and prompt procedures to challenge the background check's validity. This subsection places too great a burden on the child care organization. As a practical matter, it is extremely difficult to ensure that a care-giver will not have unsupervised access to children in a child care setting. We would support language requiring a child care organization to reinstate an employee in the first available opening if the individual was found not to have been indicted or convicted of a "background check crime." We believe that if we err, we should err on the side of the safety of the children.

In a related section, (D)(iii), it states that the background check "should not be the sole basis for determining the fitness of a provider." While the child care organizations I represent will continue to check references thoroughly, if a potential employee is found from a background check to be a child abuser, it is quite conceivable that the background check would indeed be the sole basis for determining the fitness of that individual.

Subsections (H) and (I) of section 5 "hold harmless" "authorized agencies" and state employees "for failing to prevent a qualified entity from taking action adverse to a provider on the basis of a background check." We strongly urge that a similar provision be added to the legislation holding harmless child care organizations that take adverse action against a care-giver on the basis of a background check. Again, we are not opposed to safeguards to protect the care-giver once the background check is found to be erroneous.

Another of our concerns relates to the time allowed for the state-designated office to respond to a background check request. We think 20 business days is too long. We understand that the legislation must weigh the needs of the child care organization against the capabilities of the state-designated office, but we believe the turn-around time needs to be shorter, perhaps something like 10 business days.

We would be disingenuous if we did not express our concern about the cost of background checks. Any costs which we incur will ultimately be passed on to our customers - families struggling to provide care for their children. I can tell you that we lose children when our costs go up even a little bit. If the cost is borne by the potential employee, this adversely affects recruitment. We don't have a solution to this dilemma, but we ask that the Committee take the cost factor into consideration as the legislation is refined.

On a more positive note, I would like to commend you, Mr. Chairman, for making the legislation applicable to all child care organizations, regardless of whether they are

regulated by the state. Too often, we have one standard of safety and health for children in licensed care, and a lower standard for children in non-licensed care. We would like to reiterate our long-standing support for the state regulation of all child care settings, and applaud your recognition of the fact that our children deserve a minimum level of safety and health regardless of the child care setting their parents choose.

In preparation for this hearing, I conducted a quick survey of the state background check procedures in some of the states in which we operate. As you might expect, the procedures are all over the lot. At least 29 of the states I surveyed had mandatory background checks. Some states conducted background checks only on management. The cost of background checks ranged from free in six of the states I surveyed to $37.00 in Colorado (which includes an FBI and Colorado Bureau of Investigation check). The turn-around time for the background checks ranged from literally hours in Mississippi to 18 months in Louisiana, with the average being around thirty days. State and local police are the primary contact agency in a little less than half of the states with mandatory background checks. Except where it was prohibited by state law, all of the child care organizations I surveyed hired the care-giver contingent upon a "clean" record. Many of the managers I spoke with could not recall ever receiving a background check showing that a potential employee had a criminal record. And in only two instances did managers indicate that they had received a background check that was later found to be erroneous.

Thank you again for giving us this opportunity to testify today. We look forward to working with the Committee to craft a bill that will provide a national system for accurate, up-to-date information on child abuse crimes. I would be happy to try to answer any questions.

The CHAIRMAN. I want to thank you for looking at the legislation so thoroughly and for your constructive criticism of the legislation, some of which I agree with and some of which I do not, but I am impressed by the fact of how seriously you have taken this charge you were given.

I would point out, with regard to the time turn-around, we have enough problem getting States, under their strict budget constraints now, to take on this responsibility at all, and I do not mean that as a criticism of any State. It is just a natural fact of life. We found the same thing with regard to checks with regard to the Brady bill, which is totally unrelated to children and had to do with guns, and it is amazing how difficult the turn-around time may be, but we will be delighted to speak with you about how realistic in reducing that turn-around time.

Mr. MARTIN. Just one quick comment, Mr. Chairman. Being a native of Alabama, I think I can say this about my neighbor, Mississippi. Mississippi does a background check in a number of hours, and I think if Mississippi can do it, then perhaps a 10-day waiting period might not be too much to ask for the other States.

The CHAIRMAN. You are not getting me into that one. [Laughter.]

Mr. Walsh.

STATEMENT OF JOHN WALSH

Mr. WALSH. I, too, would like to thank this committee for having this hearing. I think it is very appropriate that this bill would come before this committee, because there are so many child advocates on this committee.

I work with Senator Simon, Senator Metzenbaum, and with you, Senator Biden, on other pieces of legislation, with Senators Thurmond and Senator Grassley and Senator Hatch. You have been outstanding child advocates, and I am sincere in saying that you have passed more meaningful child protection legislation in the last 5 years or so than probably has been passed in the Senate for 30 years, so I commend you.

The CHAIRMAN. Thank you.

Mr. WALSH. I want to thank Oprah for coming here today. The last time I saw her, I was on her show and we brought our toughest case from "America's Most Wanted," and she lends tremendous power to the battle for child advocates, because that guy that we profiled on her show that we could not catch, the show was seen in Europe and he was arrested on his yacht, as he pulled into Sardinia, Italy, so she is going to be able to carry the message to 20 million people.

I would also like to thank Governor Thompson. I had the privilege of working with him when he was the Governor in Illinois.

The CHAIRMAN. You probably worked him, too, John.

[Laughter.]

Mr. WALSH. Yes, I did.

The CHAIRMAN. Believe me, we all understand on this committee your ability to work us.

Mr. WALSH. But he was an easy sell and he invited me to lots of bill signings and he did a great job for Illinois. As a matter of fact,

his I Search group in Illinois set the standards nationwide for investigation of child crimes.

I wanted to talk about some specifics of the bill today and to talk about some of the ramifications of the bill that you might not have considered, and some of the ways it might be expanded.

Oprah alluded to Dr. Gene Abel's incident study of pedophiles, about 450 pedophiles that admitted to or were convicted of 67,000 molestations. What that study also dramatically showed is those pedophiles said "we are good at beating the system or how to beat the system." The average pedophile in that study had 100 victims before he was caught, so they know how to beat the system.

Every State in this Nation mandates at last 50 background checks. You cannot be a doctor, you cannot be a lawyer, you cannot rub down a sweaty horse at a race track anywhere in the United States, unless you have had a felony background check. You cannot deliver toilet paper to the casinos in New Jersey, unless you have had a State and Federal background check.

I do not think that it is too much to ask that we do the same thing for our kids. If we do not allow somebody to rub down a sweaty horse at a race truck, but we allow a previously convicted child molester to teach school or work at a day care center, then I think our priorities are in great disorder.

Volunteers are an aspect of this bill that is very important. I challenged Big Brothers and Big Sisters in 1984. I said you have got pedophiles in your organization. You know, you are a big supporter of Big Brothers and Big Sisters. In one year, they had 80-plus reports of physical or sexual abuse of little brothers. I said what is a better playing field for someone that wants to abuse children? Do they get a kid who is desperate for love? Well, Big Brothers now do background checks and they pay the cost of it themselves. They do not want anyone with a previous conviction messing with a Big Brother or a Little Sister.

In Florida, we passed a background check for teachers. We were amazed, when we found out that 35 existing teachers were convicted felons, and 3 of them, unfortunately, were from Governor Thompson's State. They were in a sex disorder offenders program, and they met each other. They came to Florida, because they knew that we did not do background checks on teachers, and the only way they were caught was one night when the school computer printer broke down, they were plagiarizing the NAMB bulletin, the North American Man-Boy Love Association bulletin, that cost $15, on how to have sex with children, and the guy who came in to fix that computer put in that disc and could not believe what was printed out. Those guys were arrested.

When it came to light, the principal of that school had fingerprinted those individuals, but he had only gone through the State felony files. They had never been arrested in Florida. He never spent the extra $23 to check the Federal felony files, because he would have found out that one of them was a child murderer who served 11 years, and two of the other guys were child pornographers and child molesters.

Private schools are a big problem. This bill should be expanded to private schools and allow private schools to do the background checks. A few years ago, the Washington Post ran a big story about

a guy named Harrington who was the headmaster of a school in New England and was convicted of child abuse, feigned his own death, left his shoes and his car at a lake up there and came down here to Washington, DC and became the headmaster at the Hebrew Academy.

Some of you here may remember that case. And he was arrested and fled on bond for sexual assault of several children at the Hebrew Academy, and there were many lawyers who worked at the Justice Department whose kids were at the Hebrew Academy that said how could we have a previously convicted child molester become the headmaster of the Hebrew Academy. Price schools need that access, too.

This national registry may have great implications for law enforcement, something that you may not have really even looked at. We did a guy on "America's Most Wanted" by the name of Teddy Untereiner. He had been convicted of molestation in Colorado in 1975. He escaped from a Colorado mental hospital and went to California. Who did he work with? Kids. He was a volunteer, he was a Boy Scout assistant, he was a Big Brother. He was arrested for molestation in Berkeley in 1980. He was then arrested two more times in San Francisco. In 1987, he was indicted on 15 counts of sexual assault of children, as a volunteer in the Laotian community. We profiled him on our show, and guess where he was? He was in jail in Vancouver, BC. What was he in jail for? Sexual molestation of children in the Laotian community in Vancouver, BC.

They know how to beat the system, they know where to go to beat the system. They are more sophisticated than law enforcement. I think it would be a great tool, because when that police officer has a suspect somewhere or someone he has to go and arrest, he may be able to push up in that NCIC computer and say this guy is under an alias, this guy is a convicted child molester, he is wanted, he is out on bond.

Jeffrey Dahmer, the serial killer, everybody seems to forget that Jeffrey Dahmer started as a pedophile. Everybody says he only molests and kills black and Asian young men. Jeffrey Dahmer was convicted of molesting and kidnapping a Laotian child. He was then paroled. His parole officer said I am not going to go visit Jeffrey Dahmer, because the area he lives in is too rough an area. That might have stopped him.

But one night, people got a call from people that were in that rough area that were very concerned about a 14-year-old boy running around the streets in Milwaukee, incoherent, bleeding profusely from his anus. He could not talk, because he had been drugged. Those three police officers took that boy back to Jeffrey Dahmer's apartment, and Jeffrey Dahmer talked them out of it, said it was a homosexual lover triangle and all this type of stuff.

I still question—and I am the biggest supporter of law enforcement, I am their partner, No. 1 partners—why three street-smart cops could take a 14-year-old boy that was naked in the streets, bleeding from the anus, and take him back in that apartment to spend 3 or 4 hours to be tortured before he died. All they had to do was run through that NCIC computer in their police car, and if there was a national registry, a bullet would have come up, it would have said "Jeffrey Dahmer, convicted sex offender, Jeffrey

Dahmer on parole," and that Laotian boy, a missing child, he was in the NCIC.

This could have great ramifications for law enforcement in assisting, in catching perpetrators who have gone out and changed their names and their aliases and commit crimes throughout the communities, not necessarily in day care centers or not necessarily as volunteers relating to children.

I know that Senator McConnell is going to talk about his bill, and you know that. I urge you, in the spirit of bipartisanship, maybe that you and Senator Thurmond consider merging those bills, both good bills. That is your business, and——

The CHAIRMAN. We are happy to have his participation.

Mr. WALSH. I think it would be good. We have done it before. I have testified before this committee, where there have been different bills, and you have gone back——

The CHAIRMAN. Are there aspects of that bill that are not included in this bill?

Mr. WALSH. There are a couple of aspects, particularly something you said much earlier to Oprah, that you needed her help on bills that did not have money and oversight. Senator McConnell's bill has some reasonable dollars attached to it. That is what is going to make this bill work. I think it is going to fly through the Senate. I have been before this committee many times. Then it goes to the House and then we all have to drag over to the House and hope we can get it through the House.

But it will not work, if there is an oversight and if there is not moneys attached to it, because those law enforcement agencies that are going to have to deal with this do not have the moneys and the resources to handle the incredible amounts of background checks that are going to be asked of them. There has to be some assistance on the Federal level. It is one thing to pass meaningful legislation and say do it; it is another thing to get it done and to get it done right.

I could go on and on and cite lots of examples, but there have been examples today. I just feel strongly that people must understand, this bill is not a "Big Brother" bill, this is not a witch hunt, this is not something that this Senate committee is doing to make this 1986 Orwellian society. This is simply to give children the same rights that we give to real estate. We mandate in 35 States, you cannot be a real estate agent, without a background check. I think our kids are worth as much as our real estate, and that this bill could be expanded to make background checks available for lots of other people who work with children and care about children.

And the cost is an important factor, I know you are going to deal with that. Every teacher in Florida, every doctor, every lawyer, every real estate person that wants to go and work in that occupation and go through that background check absorbs the cost themselves. That is a simple way to deal with it. I do not think the Federal Government can pick up that tab.

But I commend this committee. It is like preaching to the choir, because you are some very outstanding child advocates here. I appreciate the testimony of other people on this panel, again, Oprah

for coming here, because she lends that sparkle of the media to these hearings and will speed this bill right through.

Thank you for the time.

The CHAIRMAN. Thank you for your usual succinct, but inclusive testimony.

Let me point out, John, let me begin by suggesting that, as you remember, in last year's crime bill that passed, the last one that passed, we added $70 million for the NCIC, and there was some great debate about that, as you recall, on how we spend the money for it, to upgrade it between now and 1995. I agree with you, it could be a boon to law enforcement.

We even tried to provide dollars, so that every automobile that police officers have would be able to punch up with the fingerprinting capability——

Mr. WALSH. It is such a vital tool. We did a guy on our Friday night show who was wanted for murder and abuse of women, was in the Fulton County jail in Atlanta. The prisoners who were watching the show screamed, if you saw it on the AP wire, he ran in the cell to protect himself. He had been in that jail for 55 days and they could not get the prints back on him, and he was on the Federal Marshals 15 most wanted. That appropriation should have been done 10 years ago, and you know that.

The CHAIRMAN. As you know, the fight, I am sorry we did not get the $70 million a year ago.

Mr. WALSH. I know.

The CHAIRMAN. Let me ask you a question here, because we are very anxious to hear from Senator McConnell on his bill. Now, the compliance and funding provision of Senator McConnell's provision which was included in the crime bill which is before us now on which Senator Thurmond and I are trying to negotiate with the House before Thanksgiving, God willing——

Mr. WALSH. God bless you.

The CHAIRMAN [continuing]. This is one piece of it. The provision in the crime bill which is the product of Senator McConnell's efforts, suggests that State compliance, each State shall have 3 years from date of enactment of this title to implement the provisions of the bill. Then it says,

> Ineligibility for funds. the allocation of funds under the Omnibus Crime and Safe Streets Act of 1968 received by States not complying with this provision 3 years after date of enactment of this title, shall be reduced by 25 percent.

Now, I may be mistaken—I am anxious to hear from Senator McConnell—but as I understand, he provides no money for this. He says if you do not do this, we are going to take away 25 percent of your moneys that go to local law enforcement, and a range of other things.

Whereas, in the bill that Senator Thurmond and I are introducing, we are providing $20 million to the States now to get the States to go out and do this now, so that we do not have to wait 3 years. We are giving them up-front money. Now, knowing how well you know this area, maybe we do both, I do not know, but to the extent you have a recommendation, we would appreciate it.

Mr. WALSH. The money is crucial, and you are right on target with the money, because the first thing you are going to——

The CHAIRMAN. The front-end money, the $20 million here.

Mr. WALSH. The front-end money. The first thing you are going to hear from the Florida Department of Law Enforcement, who does background checks, is we are strapped, we are swamped, the first thing you are going to hear is we have to do cops first, we have to do doctors, we cannot do day care providers. But I believe there has to be—again, as a great partner as I am with law enforcement, there has to be some penalty for non-compliance.

The CHAIRMAN. I agree.

Mr. WALSH. If you mandate in this bill you must put in felony convictions of child molesters, so that the FBI—the FBI NCIC, as you well know, is only a repository, it is only as good as who uses it, so you say here is a penalty, if you do not get it in shape in 3 years and we do not see all the felony child abusers in this, we are going to cut some funds somewhere. It is a great bill.

The CHAIRMAN. So, you are basically suggesting both?

Mr. WALSH. Absolutely.

The CHAIRMAN. Front-end and a penalty provision.

Mr. WALSH. Without a doubt.

The CHAIRMAN. Well, I have a number of questions, but I am going to withhold them at this moment and yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Excuse me one moment. Ms. Winfrey has to leave at this time. It is not out of lack of interest of the questioning or the remainder of the concerns. She has other commitments relating to this issue that has to take place, so let me—I do not want anyone to think that your having to leave now is your lack of interest, so thank you very much for coming. I appreciate it very, very much.

Senator Thurmond.

Senator THURMOND. Mr. Chairman, I want to thank this panel, all of you for coming and making such a fine contribution.

Mr. Walsh, I wish to commend you for your good work over the years since your son was kidnapped and killed.

Mr. WALSH. Thank you.

Senator THURMOND. Throughout your work with Adam Walsh Center and the National Center for Missing and Exploited Children, you have had the opportunity to examine first-hand the efforts being waged to fight child abuse at the State and local level. As you know, some might argue that the legislative proposal we have been discussing goes too far and raises civil liberties concerns. Would you mind discussing whether these concerns are legitimate and how these arguments fare, in light of the background checks many States have already implemented?

Mr. WALSH. I think you have done your homework, because, to my knowledge, there is no opposition or even concern by the ACLU, for example, with this bill. You have put in adequate provisions, so that someone can either turn down the request for the consent form—I myself would like to see it mandated in every State, there are five States that do not have mandatory background checks for teachers, child care providers, any aspect, five States that have none whatsoever—but I think you have dealt with it adequately.

You have given the person a chance to say no, I do not want to do the background check, and you have made some pretty adequate provisions in there, if in the case that the individual is erroneously charged or there might be a housekeeping error. Senator Biden was right, it is a terrible stigma, to be falsely accused of child abuse or sexual assault of children, but that can be dealt with and I think you have deal with it. To my knowledge, there are not any really, really serious concerns with this bill.

Senator THURMOND. Thank you very much. I have a few more questions of other witnesses, if I would just enter those for the record, it will save time.

Mr. Chairman, I ask unanimous consent, since Senator McConnell had to leave for another meeting, that his statement appear in the record.

The CHAIRMAN. Without objection, the statement will appear in the record.

[The prepared statement of Senator McConnell follows:]

U.S. Senator
MITCH McCONNELL

November 12, 1991

NATIONAL CHILD PROTECTION ACT

(Testimony before the Senate Judiciary Committee)

Mr. Chairman, Senator Thurmond, Members of the Committee, distinguished guests, it is a pleasure to come before you today to urge the Committee to support legislation that will help protect America's children from the horror of abuse.

Since entering public office in 1977 as Jefferson County Judge/Executive in Kentucky, child protection has been the top priority on my personal legislative agenda.

In 1979 I worked with local officials to establish the first training and explored child unit in the United States that combined the efforts of Jefferson County Police Department and the Office of Social Services. This unit proved to be successful and a model for other metropolitan communities throughout the country.

As the founder and chairman of the Kentucky Task Force on Missing and Exploited Children in 1982, I wrote Kentucky's model legislation dealing with abused children. This model legislation was adopted by the General Assembly in 1984.

On April 29, 1985, President Reagan appointed me to the National Partnership for Child Safety Committee. This committee served as a forum for exchange of information on the issue of child abuse and acted as an advisory board to state and local agencies who wished to establish or expand child protection programs.

As a member of the Senate Judiciary Committee, in May of 1985 I introduced legislation to establish national clearinghouses for information on missing and exploited children in each state. The measure was accepted as an amendment to the Missing Children's Assistance Act. At that time only six states had such clearinghouses, today 49 states do.

Later that same year, I testified on behalf of the Attorney General's Commission on Pornography and Child Abuse to urge the Attorney General to support the enactment of legislation that would impose mandatory sentences on convicted child abusers.

In March of 1987 I worked with my good friend from Pennsylvania, Mr. Specter to amend the Federal criminal code with regard to the sexual exploitation of children. That legislation made it a criminal offense for any person to coerce, intimidate, or fraudulently induce an individual 18 years of age or younger to engage in sexually explicit conduct.

Two years ago, I began to develop a legislative initiative that would require states to register the names and other pertinent information about convicted child abusers with the National Crime Information Center (NCIC) at the Department of Justice. I am pleased to say that on July 9th of this year, that idea came to fruition when the Senate unanimously accepted the measure as an amendment to the Crime Bill.

It was a step, Mr. Chairman, a step in the right direction for our children.

It is not an easy subject to talk about, yet the plight of children who are abused is a nationwide problem affecting every family, many of whom have experienced abuse and more who fear it. While hundreds of thousands of America's children are physically and sexually abused, millions more are vulnerable and live threatened.

Only by recognizing the dangers confronting our children can we take the kind of action necessary to protect them in a changing society.

Back when I was County Judge/Executive, I developed a four-point plan for child protection: DETERRENCE, prevention, treatment, and awareness.

Studies reflect that child abuse has the highest recidivism rate of any crime committed in the United States. According to the Federal Bureau of Investigation, the typical sexual offender will molest 117 youngsters in their lifetime.

We must prosecute these criminals to the fullest extent of the law, and if the law is not sufficiently tough, we must strengthen it. DETERRENCE is an essential element in fighting child abuse. I have consistently supported tougher laws against child abusers. My legislation which passed the Senate this summer, like the bill before this committee today, will build a nationwide network of deterrence.

Two other key to reducing child abuse are prevention and treatment.

Just this past week, the Senate reaffirmed its commitment to these two elements by approving the reauthorization of the Child Abuse Prevention and Treatment Act. As an avid supporter of this measure, I was pleased to see the overwhelming support among my colleagues for this legislation, which will strengthen prevention programs throughout the country.

And finally, there is awareness. The most important factor in preventing crime.

Americans must understand that not reporting an act of child abuse is almost as much a crime as abusing the child. I encourage parents, teachers, relatives and others -- whoever has contact with an abused child -- to go to your local child protection agency and let them know. That's your responsibility. It's not a crime to care about a child's well-being.

At the federal level, there are so many things that we as individual senators can do. For example, in my office, the face of a missing child along with some biographical information is posted on every letter and envelope bearing the frank of Mitch McConnell.

In closing Mr. Chairman, the National Child Protection Act illustrates that knowledge is the greatest power we have in protecting our children. By requiring states to register the names and other pertinent information about convicted child abusers, we will be able to clamp down on repeat offenders by having information available and easily accessible for every child care organization in the United States.

Oprah Winfrey has done our Nation's children a great service by coming to Washington to testify on child abuse and the need for legislation.

Ms. Winfrey's personal insight into the horror of child abuse makes her a powerful spokesperson. Her presentation and extraordinary future through the national media will help ensure that child abuse is at the top of our agenda.

I am very grateful for her contribution and commitment to protecting children. And I look forward to working with her.

I applaud the Chairman, the Ranking Member and other members of this committee for their fine work, and I look forward to working with my colleagues as this matter progresses.

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THE NATIONAL CHILD ABUSERS REGISTRATION AMENDMENT TO THE 1991 OMNIBUS CRIME BILL

Senator Mitch McConnell (R-KY)

Generic Summary

- The measure will require states to register the name, address, social security number and other pertinent information about any individual convicted of child abuse.

- The information will be reported to the National Crime Information Center of the Department of Justice by local or state officials.

- If a State chooses not to comply with the reporting requirement, that State will be denied assistance authorized under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3756).

How the legislation works:

- A conviction is handed down by a court, law enforcement officials or other agencies designated by the Department of Justice will enter the information into the National Crime Information Center Computer Network; the information is then online and available nationwide.

- The information can be accessed by any local, State, or Federal law enforcement agency as well as several other authorized organizations for the purpose of obtaining criminal background checks or assisting in criminal investigative matters.

- The legislation will enable child welfare organizations (i.e. daycare centers and schools) to conduct background checks through the police department to verify that a prospective employee does not have a criminal history of child abuse.

Statistical Information

- In 1989 there were 2.4 million cases of child abuse, of which 300,000 cases involved sexual abuse; 1 of 6 boys and 1 of 3 girls will be abused before they reach the age of 18.

- The typical offender will molest an average of 117 youngsters and garner multiple child abuse convictions from several states.

Cosponsors

- D'Amato, Lieberman, Shelby, Kasten, Rosenbaum

Senate Action

The Senate accepted the legislation as an amendment to the 1991 Omnibus Crime Bill on July 26, 1991.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Dr. Williams, based upon your research, what measures would you propose or suggest that can be adopted to increase the reporting of child abuse, whether it be in day care centers or in any other setting?

Ms. WILLIAMS. I am glad you asked that question, because there is one important finding I did not report on, and that is that we had expected when we began our study to find much of the sexual abuse in day care centers was reported to authorities by the care givers themselves, by other care givers observing the children, were being abuses or suspicious.

We found, in fact, that none of the 270 cases of sexual abuse in day care centers was actually reported by another day care provider or worker in that center. Now, lots of things have changed in the past few years, and I think that day care providers are being more thoroughly trained to report this kind of thing, but there should be efforts to make sure that everyone who works in a day care center is clearly aware of their obligation and duty and the law's requirement that they report their suspicions of abuse.

One State, I believe it is New Jersey, has enacted some whistleblower protective statutes that would facilitate reporting by other care givers, so that they would not be charged or sued for making accusations against a co-worker or reporting their suspicions of abuse by a co-worker. I think there is a lot of disincentive out there for other child care employees to report such abuse, and they need to be encouraged by both telling them of their obligations, you know, mandating training, having posted on the walls where they have to call, who they have to call, by making sure they are protected if they do report in good faith, and cannot be fired themselves for making charges against their director or against somebody else.

Senator GRASSLEY. Also, Dr. Williams, in order to identify day care operators and spouses who may pose threats of child abuse, do you favor permitting parents to have access to background checks regarding the sexual convictions of operators and/or spouses?

Ms. WILLIAMS. I think that would be a very difficult area. I think that is where the State licensing agencies have a responsibility and an obligation to be sure that the people that are providing care in their State are licensed and authorized, and what that means to a parent is that they have been checked and thoroughly screened, and that keeps it in the hands of the licensing people, rather than invading the privacy and providing that information to parents.

But a parent should know when they send the child to a licensed facility, and I think all of them should be licensed in the States, the parents should know that that check has been done and competently done, and a nationwide search would be appropriate.

Senator GRASSLEY. Mr. Hardy, based upon your experience with background checks, I believe it was in Texas, do you believe that a Federal background check should encompass not only convictions of sexual offenses, but also arrests, as well?

Mr. HARDY. Yes, I do, the reason being that a mere arrest could only be 60 days old and be very valid. I do not think it ought to stand alone as a prohibition, where 10 years old with no position, that would suggest that there probably was not a case.

Senator GRASSLEY. I would also ask Mr. Martin and Mr. Walsh to comment on that point, if you would care to.

Mr. MARTIN. Some States do now provide information on arrests and it is up to each individual State. I do not think we would be opposed, but I suspect there are others out there who would be.

Mr. WALSH. It is a serious question. Talk to authorities, talk to officials and they say if a guy has been arrested 17 times, where there is smoke, there is fire. Personally, I do not think that someone should be denied employment because of an arrest record and no convictions, but that does not speak to what actually happened. Many times, adjudication is withheld.

There are a lot of lawyers in this room and they know that someone can be arrested and then adjudication is withheld, it is almost a guilty plea and there is no arrest record, so many of the experts say that if there are a few convictions and several arrests, then it is a good indicator that the individual has been involved in that activity over a long period of time.

Personally, it is a tough one to call. It is a tough, tough call, but I would err on the side of caution and I would only prohibit people who had felony convictions from getting that occupation. If there was some way we could go back and look at all the adjudications withheld or the purged records and really—that is another aspect, that is a loophole of the criminal justice system, but it is a tough call.

Senator GRASSLEY. My last question for this panel is to you, Mr. Martin. Do you believe that the proposed legislation whose purpose, of course, is to keep child abusers away, will reduce the civil liability for negligent hiring and negligent supervision for day care providers? If so, would that perhaps reduce the cost of day care?

Mr. MARTIN. Yes, sir, I think one of the problems that we have had is with insurance, particularly the smaller operators, so that if we could have a national background check which could say that we have a greater assurance that our employees have no history of child abuse or any record or any indictment or conviction of a child abuse crime, then I think that would possibly help the situation.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I want to point out that Senator Grassley—I am not being solicitous—has been deeply involved in issues relating to child abuse and child pornography probably as much or more than anyone on this committee for a long time. We served together a long time, and he has been responsible for a lot of what we have already passed.

I agree with you, Mr. Walsh, it is a tough call. I err on the side that you suggested, because I do not know where we stop the process, if we do not do that on other background checks on other matters and where we provide a rationale to stop it.

I thank you all. I would ask you all the following, though, if you would: We would like to be able to submit to you in your home States any changes that we make in this legislation as we go along, and maybe you might not have time to sit and write us, but if you would just pick up the phone and call the designated staff on our information, to tell us what your views are and any suggestions you have on further contemplation about how to improve this legislation. It would be very much appreciated.

I want to emphasize again, we do not hold this out as a panacea. This will not, as Dr. Williams has pointed out from her studies, this will not capture for the purposes of the day care center or parents to be able to review all those who might, in fact, molest a child. It will not come close to doing that, but we believe it is a very positive step consistent with our basic principles of civil liberties in this country that does not do harm to the system, that system, and, hopefully, impacts on protecting children.

At any rate, I thank you all and I appreciate it very, very much.

Now, we had hoped to hear from Senator McConnell, but he has another engagement. He has been deeply involved in this legislation and legislation similar to this for some time, and, as Mr. Walsh indicates, all the allies that can be gathered, left, right, center, Republican, Democrat, should be gathered, in order to be able to facilitate making the world a little bit safer for children, and he has been a leader in that regard and we are anxious to incorporate any portion of his legislation.

I might add that we already incorporated his legislation in the so-called Biden crime bill. We incorporated that as a piece. I do not know whether that will survive, how it will survive a conference and a Presidential veto, if one is threatened, depending on whether guns are in the bill and those other things.

So, we are going to run two tracks here, John. We are going to run this on a separate track and improve it, as well as run the crime bill, and we will see what we can get done as rapidly as we can.

Now, I thank you all and I appreciate your help.

The CHAIRMAN. Since Senator McConnell was not able to come back, it provides us time to hear from a State legislator who was kind enough to submit his testimony earlier, but in light of the fact we have a little time, I would invite him to come forward now. His name is Senator David P. Sokola. He is a State Senator from Delaware, who has been involved in this issue and will give us, although I am catching him mildly unprepared, I suspect, since we told him he would not be testifying, will give us his perspective on this legislation from the perspective of a State Senator who inherits a lot of Federal legislation that is dropped on the doorstep for States to implement.

Welcome, Dave. It is a pleasure to have you here and any statement you have to make, we would be anxious to hear it.

STATEMENT OF DAVID P. SOKOLA, STATE SENATOR, STATE OF DELAWARE

Mr. SOKOLA. Thank you, Mr. Chairman. I would like to just briefly read.

The CHAIRMAN. Please.

Mr. SOKOLA. Mr. Chairman, your efforts to protect children in day care by installing a national background check system are to be applauded. Abuse of children is a large and under-reported problem, and abusers of children are often serial offenders who seek legitimate access to children. A system is needed, through which current, accurate information concerning persons who commit crimes of this Nation, can be obtained from a central source. This will

assist in the prevention of second incidents of abuse by providing information about such persons to organizations whose primary concern is that of child welfare and care.

According to Andrew H. Vachss, an attorney who has had significant experience with abused children, abusers fall into three basic categories: One, parents who are inadequate or have never learned how to be parents, two, those who are mentally ill and whose disorders prevent them from reaching minimal standards of patenting, and three, individuals who are evil and who physically or sexually exploit their children for profit, pleasure, or both. While all are serious, it is most important that we focus our efforts on this third category of abuser. By the way, that is the area, the category that I focused on with the legislation I have introduced in Delaware.

I am pleased to see included in the bill the statement, "to minimum extent possible, encourage the use of the best technology available in conducting background checks." As an aside, in Delaware, the background checks that are conducted are still conducted by going through file cabinets, not through electronic data base, and I think we have used technology for a lot of other categories of information gathering, and this is an area we should add it to.

We live in an age where technology can be utilized to enhance the effectiveness of everything from mass marketing to missile systems. We need to insist that the modern tools appropriate for the task be used to protect our children.

Finally, I must include a comment on the fiscal implications of this bill. In the current economic climate, State budgets are seriously strained. Federal mandates that are either not funded or underfunded have become a significant burden on State governments. If a job is worth doing, it is worth funding. It is my belief that this is a job worth doing, and we owe it to our children to find the resources to do the job right.

I would like to ask that this be included in the record.

[The prepared statement of Mr. Sokola follows:]

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EDUCATION
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HIGHWAYS & TRANSPORTATION
NATURAL RESOURCES & ENVIRONMENTAL CONTROL
PUBLIC SAFETY

Statement of David P. Sokola, State Senator, Delaware to the United States Senate Committee on the Judiciary for the committee hearing, "Protecting Children in Day Care: Building a National Background Check System," Tuesday, November 12, 1991.

Mr. Chairman:

Your efforts to protect children in day care by installing a national background check system are to be applauded. Abuse of children is a large and underreported problem, and abusers of children are often serial offenders who seek legitimate access to children. A system is needed, through which current, accurate information, concerning persons who commit crimes of this nature, can be obtained from a central source. This will assist in the prevention of second incidents of abuse by providing information about such persons to organizations whose primary concern is that of child welfare and care.

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The CHAIRMAN. Thank you, Senator. Let me speak to the last point first. As you know, as a State Senator, the Federal budget is not strained at all.

Mr. SOKOLA. That is right.

The CHAIRMAN. One of the things that we hope to do here is possibly including Senator McConnell in this legislation, which is in the crime bill now. It passed with the crime bill and there will be an abbreviated version of this legislation that will pass that would withhold up to 25 percent of the funds that go into the State of Delaware and other States for police related activities, unless they update the system.

I am of the view that we should give some up-front money to get the States off the dime in doing that, and I generally subscribe to the view that we should not be mandating things to States that we are not willing to help fund. But there are certain things that are of such basic consequence, it seems to me that there has to be a partnership and the partnership, in my view, has to include the willingness of the State, as well as the Federal Government, to fund some of these projects which generally get widespread support from State officials, as well as Federal officials.

So, I look forward to any thoughts you may have, as you consider how this legislation should actually function in terms of the funding of it, to the extent that you have time and an inclination to submit that view for the record, it would be helpful, because we take very seriously the concerns of State legislators, as we should. But in this case, it seems to me there has to be a partnership, not only a partnership in terms of the implementation of the background check information of a nationwide system to accommodate the use by local police agencies, but in terms of the funding of it, too.

Quite possibly, we may be talking about the background checks having to be funded, in part, by those who are seeking applications for jobs, although that can be very onerous, particularly in circumstances where the job is a low-paying job and the person applying for a job is already in a difficult financial circumstance.

I am not asking you now, but at some point I would appreciate for the record your input on that broad issue.

Mr. SOKOLA. I will work on that.

The CHAIRMAN. Thank you.

The last question, as I understand, we have implemented in Delaware a system of checks and we have, I am told by staff, that in 1991, roughly 400 applied for jobs involving working with children care generally, and that even with our more antiquated system of not having an updated computerized system, that the State has uncovered 35 convictions out of those 400 convictions.

I don't know whether you know, I don't expect you to know it, but to the extent, it would be helpful: In the last 7 months, those 35 convictions that have been found to exist in the first 7 months, I should say, do you know what those convictions were for? Were they for child abuse, or were they for a broader category of felony convictions?

Senator SOKOLA. I do not have that information.

The CHAIRMAN. To the extent that you would be able to submit that to us for the record, it would be helpful.

Mr. SOKOLA. All right.

[The information was not available at press time.]

The CHAIRMAN. Thank you, Senator, for your input and your interest, and we look forward to working with you. We appreciate it.

Mr. SOKOLA. Thank you.

The CHAIRMAN. The hearing is adjourned.

[Whereupon, at 12:27 p.m., the committee adjourned.]

APPENDIX

A National Plan of Action to Identify
Predatory Child Abusers
Who Engage in Employment or Activities
Involving Children

* * *

The National Child Protection Background Check Act of 1991
(Together with Supporting Materials)

* * *

Presented by:

Ms. Oprah Winfrey

Presented to:

The Congress of the United States
Washington, D.C.

* * *

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Date: October 22, 1991

FOREWORD

The materials contained in this document propose a National Plan of Action to identify predatory child abusers who engage in employment or activities involving children.

The centerpiece of the National Plan of Action is federal legislation offered to Congress for enactment, the National Child Protection Background Check Act of 1991. This bill, for the first time, would establish comprehensive National procedures to insure that those working with children, either as employers, employees, or volunteers in organized activities, do not have criminal records as child abusers or perpetrators of other serious crimes.

The National legislation is based upon the best features of State law, cleaned from a review of the laws and regulations of 25 States of the Union. While the draft bill, which respects the principles of federalism, does not force upon the States a particular system, it provides uniform guidelines for cooperating States. If States do not cooperate, they will lose new federal grants established in the bill, as well as other grants under existing anti-crime laws.

The States will cooperate, and the National System proposed in the bill will be uniformly adopted, for two reasons: First, the States will recognize that the protection of their children requires cooperation. Second, the States, in this era of declining revenues, will seek to obtain the financial benefits afforded under the bill.

Child care providers and voluntary organizations will cooperate to ensure that the new National program is successful in identifying predatory child abusers who seek employment or volunteer service with them. They will cooperate because they have deep concern for the welfare of children entrusted to their care. They will cooperate, moreover, because severe civil penalties, under the laws of every State, will likely result if a provider negligently fails to obtain the background check information on a prospective employee or volunteer that is available in the National System.

There are, in sum, compelling financial and moral imperatives for full compliance and cooperation under the National Child Protection Background Check Act of 1991. The Congress can be assured that millions of children will be protected when the Act is adopted and fully implemented throughout the United States.

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1

EXECUTIVE SUMMARY

Child abuse and violence against children is a growing problem that must be stopped. The most effective way to address this problem is to prevent child abusers from gaining access to children. The National Child Protection Background Check Act of 1991 (the "Act"), which is the centerpiece of this proposed National Plan of Action, presents an effective means of combatting child abuse outside the home. The Act would reduce the threat of such abuse by permitting a wide variety of child care organizations to conduct nationwide background checks of potential employees and volunteers for criminal histories.

Existing methods for screening child care providers are inadequate. Most States do not provide a reliable means for detecting repeat offenders, either because they cannot obtain information on a national level, because they require or permit background checks only for limited offenses, or because background check procedures are required or available only for narrowly defined classes of child care centers. Those States that have adequate systems in place often lack operating funds.

The proposed legislation addresses the inadequacies in existing State laws. First, the legislation requires States to report child abuse crimes to the FBI in a timely and uniform manner. Regulations to be established by the Attorney General will establish national guidelines on the format, accuracy, content, and timeliness of information, and will promote cooperation with other

States and with national child abuse prevention organizations in developing a nationwide system.

The Act would also establish minimum Federal standards that are designed to protect children from potential child abuse in as many non-home settings as possible. For this reason, the minimum federal standards contained in the Act apply to a wide range of employees and volunteers, child care organizations, and crimes. Job applicants and volunteers are protected as well: the Act gives individuals the right to challenge and correct inaccurate records before any adverse action is taken on the basis of a background check.

The proposed legislation will assure that the States have adequate flexibility in incorporating minimum federal standards into State law and practice. In addition, the Act will not mandate State compliance with federal minimum requirements. Instead, it will provide significant implementation incentives to the States through new federal funding of $100 million over three years, and through restrictions on the availability of existing administrative and other funding programs.

The background check process, established as guidelines by the Attorney General, will operate in the following manner. First, State law must require that a child care organization submit a written form to the potential employee or volunteer requesting that the individual list his or her criminal history, if any. The form must inform the individual that the organization intends to conduct a background check, and describe the right to challenge

background check information. This form serves as the individual's waiver of Privacy Act provisions and assures that the individual is clearly informed of his or her rights. The background check may be conducted only after the child care organization has received a signed form from the individual.

The guidelines will also require that the States have procedures allowing an individual to obtain a copy of the background report, and any information that forms the basis of the report. In addition the State must provide a mechanism for challenging the accuracy of any report or other information. During a challenge, the child care organization cannot take any adverse action, such as firing or denial of employment, until the challenge has been resolved. To protect children during a challenge, the child care organization might decide to prohibit the individual from having unsupervised access to children. The challenge procedure will protect an individual's reputation and opportunity to gain employment. Many existing State laws lack this protection.

The State must respond to a background check request within fourteen days. This response must state, at a minimum, whether or not the list of crimes submitted by the individual is accurate. This requirement will give child care organizations the benefit of a nationwide search but will not interfere with those States that have strict laws on the confidentiality of criminal records. Other States that have "open records" laws and other less restrictive rules governing criminal history records may

be permitted to release more information to the child care organization.

The Act presents a flexible framework for the States by allowing the use of other, equivalent background check procedures if the Attorney General certifies that they meet the purposes of the Act. For example, some State licensing procedures screen a potential employee for certain crimes and give the person a certificate indicating that he or she has passed the screening process. These and other procedures may be acceptable substitutes under the Act. However, equivalent procedures must allow all child care organizations to obtain the benefit of a nationwide search for all the classes or individuals and crimes set forth in the Act. The Act encourages States to use fingerprints and any other technologically advanced means of conducting background checks.

The Act requires the Attorney General to issue regulations within 180 days after enactment. This will facilitate prompt implementation and give States and child care organizations guidance on the provisions of the Act. Finally, the Act gives the States two years to comply with its provisions. This should be sufficient time to permit the States to develop and implement necessary procedures and takes into account the differences in legislative schedules among the States.

_____
(Original signature of Member)

102d CONGRESS

1st SESSION H.R. _____

To establish a national background check procedure to insure that those working as child care providers do not have a criminal history of child abuse, to initiate the reporting of all State and federal child abuse crimes to the National Crime Information Center, to establish minimum guidelines for States to follow in conducting a background check and provide protection from inaccurate information for those subjected to a background check, to create financial incentives for States to implement background check procedures, and for other purposes.

_____

IN THE HOUSE OF REPRESENTATIVES

_____, 19____

Mr. _____ (for himself, _____, _____, _____, _____, and _____)

introduced the following bill:

_____

A BILL

To establish a national background check procedure to insure that those working as child care providers do not have a criminal history of child abuse, to initiate the reporting of all State and federal child abuse crimes to the National Crime Information Center, to establish minimum guidelines for States to follow in conducting a background check and provide protection from inaccurate information for those subjected to a background check, to create financial incentives for States to implement background check procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "National Child Protection Background Check Act of 1991".

FINDINGS AND DECLARATIONS

SEC. 2.(a) The Congress finds that--

(1) increases have occurred in recent years in the abuse of children by persons who have previously committed crimes of child abuse or other serious crimes;

(2) although most child care providers are caring and dedicated professionals, child abusers and others who harm or prey on children frequently seek employment in or volunteer for positions that give them access to children;

(3) exposure to child abusers and others who harm or prey on children is harmful to the physical and emotional well-being of children;

(4) many children who run away from home, fall prey to pornography and prostitution, suffer a dependency on alcohol and drugs, or become juvenile offenders, have been victims of child abuse or other serious crimes;

(5) there is no reliable, centralized national source through which child care organizations, including voluntary organizations, may obtain the benefit of a nationwide criminal background check on persons who provide or seek to provide child care;

(6) the laws and procedures of a number of States do not permit child care organizations, including voluntary organizations,

to obtain the benefit of a nationwide criminal background check on persons who provide or seek to provide child care; and

(7) because such State laws and procedures are inadequate to permit effective background checks, persons who have committed acts of child abuse or other serious crimes in one State have committed such crimes in other States, often when holding a position of authority over children.

(b) The Congress therefore declares that the purposes of this Act are --

(1) to establish a National System through which child care organizations, including voluntary organizations, may obtain the benefit of a nationwide criminal background check to determine if persons who are current or prospective child care providers have previously committed child abuse crimes or other serious crimes;

(2) to establish minimum criteria for State laws and procedures that permit child care organizations, including voluntary organizations, to obtain the benefit of a nationwide criminal background check to determine if persons who are current or prospective child care providers have previously committed child abuse crimes or other serious crimes;

(3) to provide procedural rights for those persons who are the subject of a nationwide criminal background check, including procedures to challenge and correct inaccurate background check information;

(4) to establish a national system for the reporting by the States of child abuse crime information; and

(5) to document more completely the problem of child abuse in the United States by providing statistical and informational data to the Department of Justice, the National Center on Child Abuse and Neglect, the Congress, and other interested parties.

DEFINITIONS

SEC. 3. For the purposes of this Act --

(1) the term "child" means a person who is a child for purposes of the criminal child abuse law of a State;

(2) the term "child abuse" means the physical, psychological or emotional injuring, sexual abuse or exploitation, neglectful treatment, or maltreatment of a child by any person in violation of the criminal child abuse laws of a State.

(3) the term "child abuse crime" means --

(A) a crime committed under any law of a State that establishes criminal penalties for the commission of child abuse by a parent or other family member of a child or by any other person; and

(B) such other crimes as the Attorney General determines are indicative of a potential to abuse children.

(4) the term "child abuse crime information" means the following facts concerning a person who has been arrested for or convicted of a child abuse crime --

(A) full name, social security number (if available), age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, fingerprints, and a brief description of the child abuse crime or offenses for which the person has been arrested or convicted; and

(B) any other information that the National Crime Information Center or the Federal Bureau of Investigation determines may be useful in identifying persons arrested for or convicted of a child abuse crime;

(5) the term "background check crime" means --

(A) a child abuse crime, murder, manslaughter, aggravated assault, kidnapping, arson, sexual assault, incest, indecent exposure, prostitution, promotion of prostitution, promotion of pornography, and felony offenses involving the use or distribution of controlled substances; and

(B) such other crimes as the Attorney General determines are indicative of a potential to abuse children.

(6) the term "child care" means the provision of care, treatment, education, training, instruction, supervision, or recreation to children;

(7) the term "qualified entity" means a business or organization, whether public, private, for profit, not for profit or voluntary, that provides child care, including a business or organization that licenses or certifies others to provide child care;

(8) the term "provider" means --

(A) a person who (i) is employed by or volunteers with a qualified entity, (ii) who owns or operates a qualified entity or (iii) who has or may have unsupervised access to a child to whom the qualified entity provides child care; and

(B) a person who (i) seeks to be employed by or volunteer with a qualified entity, (ii) seeks to own or operate a qualified entity or (iii) seeks to have or may have unsupervised access to a child to whom the qualified entity provides child care;

(9) the term "authorized agency" means a division or office of a State designated by a State to report, receive or disseminate information under this Act;

(10) the term "State" means each of the States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam and the Trust Territories of the Pacific; and

(11) the term "National Crime Information Center" means the division of the Federal Bureau of Investigation that serves as

an information source on criminal history records, wanted criminals, persons named in recent arrest warrants, runaways, missing children, and stolen property for use by Federal, State and local law enforcement authorities.

REPORTING BY THE STATES

SEC. 4.(a) **In General.--** An authorized agency of a State may report child abuse crime information to the National Crime Information Center.

(b) **Procedures.--** The Attorney General shall by regulation prescribe procedures to ensure that all States may report child abuse crime information to the National Crime Information Center.

(c) **Guidelines.--** (1) The Attorney General shall establish guidelines for the reporting of child abuse crime information, including guidelines relating to the format, content, accuracy and timeliness of registration information and other procedures for carrying out the purposes of this Act.

(2) The guidelines established under paragraph (1) shall require that--

(A) a reporting State ensure that reports of all convictions and arrests for child abuse crimes are reported and maintained by an authorized agency of the State in such a manner as to facilitate the carrying out of the purposes of this Act; and

(B) an authorized agency of State maintain close liaison with the National Center on Child Abuse and Neglect and the National Center for Missing and Exploited

Children for the exchange of information and technical assistance in cases of child abuse.

(d) **Annual Summary.**-- The Attorney General shall publish an annual statistical summary of the child abuse crime information reported under this Act. Such annual statistical summary may not contain any information that may reveal the identity of an individual victim of a crime.

BACKGROUND CHECKS

SEC. 5.(a) **In General.**-- A State may have in effect procedures (established by or under State law or regulation) to permit a qualified entity to contact an authorized agency of the State to request a nationwide background check for the purpose of determining whether or not a provider is the subject of any reported conviction for a background check crime. The authorized agency shall access and review State and federal records of background check crimes through the National Crime Information Center and shall respond promptly to the inquiry.

(b) **Guidelines.**-- (1) The Attorney General shall establish guidelines for State background check procedures established under subsection (a), including procedures for carrying out the purposes of this Act.

(2) The guidelines established under paragraph (1) shall require that--

(A) no qualified entity may request a background check of a provider under subsection (a) unless the

provider shall have first completed and signed a document that--

(i) contains a question asking whether the provider has ever been convicted of, arrested for or charged with a background check crime and, if so, requires a description of the crime, the particulars of the conviction and the disposition of the arrest or charge; and

(ii) notifies the provider that the entity will request a background check under subsection (a) and notifies the provider of the provider's rights under subparagraph (B);

(B) States shall establish procedures under which a provider who is the subject of a background check under subsection (a) is entitled--

(i) to be informed that a qualified entity will request a background check on that provider;

(ii) to obtain a copy of any background check report and any record that forms the basis for any such report; and

(iii) to challenge the accuracy and completeness of any information contained in any such report or record and obtain a prompt determination from an authorized agency as to the validity of such challenge;

(C) an authorized agency shall respond to an inquiry under subsection (a) no later than fourteen (14)

days after its receipt of the document described in subparagraph (A), provided that the Attorney General may require a response within a shorter period if such a response is feasible under reasonably available technology;

(D) the response of an authorized agency to an inquiry under subsection (a) shall, at a minimum, state whether the background check crime information set forth in the document required under subparagraph (A) is complete and accurate;

(E) no qualified entity may take action adverse to a provider on the basis of a background check under subsection (a) until the provider has obtained a determination as to the validity of any challenge under subparagraph (B) or waived the right to make such challenge;

(F) background checks under subsection (a) may be requested by and provided to only authorized representatives of a qualified entity who have a need to know such information and may be used only for the purposes of this section; and

(G) the information disclosed to qualified entities under this section shall be limited to the information reasonably required to accomplish the purposes of this Act.

(c) **Equivalent Procedures.**-- (1) Notwithstanding anything to the contrary in this section, the Attorney General may certify

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that a State licensing or certification procedure that differs from the procedures described in subsections (a) and (b) shall be deemed to be the equivalent of such procedures for purposes of this Act, provided that the procedures described in subsections (a) and (b) shall continue to apply to those qualified entities, providers and background check crimes that are not governed by or included within the State licensing or certification procedure.

(2) The Attorney General shall by regulation establish criteria for certifications under this subsection. Such criteria shall include a finding by the Attorney General that the State licensing or certification procedure accomplishes the purposes of this Act and incorporates a nationwide review of State and federal records of background check offenses through the National Crime Information Center.

(d) **Records Exchange.**-- The Attorney General is authorized to exchange Federal Bureau of Investigation identification records with authorized agencies for purposes of background checks under subsection (a) and may by regulation authorize further dissemination of such records by authorized agencies for such purposes.

(e) **Regulations.**-- The Attorney General shall by regulation prescribe such other measures as may be required for carrying out the purposes of this Act, including measures relating to the security, confidentiality, accuracy, use, misuse and dissemination of information, and audits and recordkeeping. The Attorney General shall, to the maximum extent possible, encourage the use of the best technology available in conducting background checks.

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CONDITION ON GRANTS

SEC. 6.(a) **Condition On Grants.**-- Compliance with sections 4 and 5 shall be a condition to the receipt by a State of any grant, cooperative agreement, or other assistance under --

(1) section 1404 of the Victims of Crime Act (42 U.S.C. 10603); and

(2) the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 et seq.).

(b) **Condition Expenditure of State Funds.**-- Compliance with sections 4 and 5 shall also be a condition for the expenditure by any State of funds received under title XX of the Social Security Act, as amended (42 U.S.C. § 1397 et seq.), for staff training, administration, planning, evaluation, and technical assistance in developing, implementing or administering the State social service program.

AUTHORIZATION OF APPROPRIATIONS

SEC. 7.(a) **State Implementation Grants.**-- There is authorized to be appropriated to the Department of Justice for making grants under this section a total of $100 million for the three fiscal years beginning one year after the enactment of this Act.

(b) **Block Grants.**-- From the amounts appropriated under subsection (a) for any fiscal year, the Attorney General shall make grants to States for the purposes of implementing, supporting and

enhancing the activities undertaken by States to administer the provisions of this Act.

(c) **Administrative Requirements.**-- The Attorney General shall by regulation establish administrative requirements necessary to carry out this section.

EFFECTIVE DATES

SEC. 8.(a) **Regulations and Guidelines.**-- The Attorney General shall promulgate all regulations and guidelines required under this Act within 180 days after the enactment of this Act.

(b) **Application to States.**-- The requirements of this Act shall apply to States beginning 2 years after the date of enactment of this Act.

Section by Section Summary

THE NATIONAL CHILD PROTECTION BACKGROUND CHECK ACT OF 1991

This Act establishes a national background check procedure to insure that those working as child care providers do not have a criminal history of child abuse. It encourages the reporting of all State and federal child abuse crimes to the National Crime Information Center, and establishes minimum guidelines for States to follow in conducting background checks. The Act also allows individuals to challenge inaccurate information contained in a background check. Finally, the Act conditions financial assistance to the States upon compliance and creates financial incentives for States to implement background check procedures.

SHORT TITLE

The title is the "National Child Protection Background Check Act of 1991".

FINDINGS AND DECLARATIONS

The Congressional findings summarize the magnitude of the child abuse problem in the United States. The purposes of the Act are also set forth. These findings and declarations are to become an important part of the legislative history of the Act.

The Congress finds that--

(1) increases have occurred in recent years in the abuse of children by persons who have previously committed crimes of child abuse or other serious crimes;

(2) although most child care providers are caring and dedicated professionals, child abusers and others who harm or prey on children frequently seek employment in or volunteer for positions that give them access to children;

(3) exposure to child abusers and others who harm or prey on children is harmful to the physical and emotional well-being of children;

(4) many children who run away from home, fall prey to pornography and prostitution, suffer a dependency on alcohol and

drugs, or because juvenile offenders, have been victims of child abuse or other serious crimes;

(5) there is no reliable, centralized national source through which child care organizations, including voluntary organizations, may obtain the benefit of a nationwide criminal background check on persons who provide or seek to provide child care;

(6) the laws and procedures of a number of States do not permit child care organizations, including voluntary organizations, to obtain the benefit of a nationwide criminal background check on persons who provide or seek to provide child care; and

(7) because such State laws and procedures are inadequate to permit effective background checks, persons who have committed acts of child abuse or other serious crimes in one State have committed such crimes in other States, often when holding a position of authority over children.

The Congress therefore declares that the purposes of this Act are --

(1) to establish a National System through which child care organizations, including voluntary organizations, may obtain the benefit of a nationwide criminal background check to determine if persons who are current or prospective child care providers have previously committed child abuse crimes or other serious crimes;

(2) to establish minimum criteria for State laws and procedures that permit child care organizations, including voluntary organizations, to obtain the benefit of a nationwide criminal background check to determine if persons who are current or prospective child care providers have previously committed child abuse crimes or other serious crimes;

(3) to provide procedural rights for those persons who are the subject of a nationwide criminal background check, including procedures to challenge and correct inaccurate background check information;

(4) to establish a national system for the reporting by the States of child abuse crime information; and

(5) to document more completely the problem of child abuse in the United States by providing statistical and informational data to the Department of Justice, the National Center on Child Abuse and Neglect, the Congress, and other interested parties.

DEFINITIONS

The following defined terms are used in the Act --

(1) "Child" is defined by the criminal child abuse laws of a State.

(2) "Child abuse" is defined by the criminal child abuse laws of a State.

(3) "Child abuse crime(s)" are to include those defined by the laws of the State that establish criminal penalties for child abuse, and those enumerated by the Attorney General as indicative of a potential to abuse children.

(4) "Child abuse crime information" means the information reported to the National Crime Information Center by each State, which will become available for all States to access. It consists of the following data on persons who have been arrested for or convicted of a child abuse crime:

(1) full name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, legal address, fingerprints and a brief description of the offenses for which the person has been arrested or convicted; and

(2) any other information that the National Crime Information Center or the Federal Bureau of Investigation determines useful.

(5) "Background check crime" is a child abuse crime, murder, manslaughter, aggravated assault, kidnapping, arson, sexual assault, incest, indecent exposure, prostitution, promotion of prostitution, production of pornography, and felony involving controlled substances, and any other crimes that indicate a potential to abuse children.

(6) "Child care" is the provision of care, treatment, education, training, instruction, supervision or recreation to children.

(7) "Qualified entity" is any public, private, charitable, or voluntary organization or business that provides child care. This includes any business that licenses or certifies others to provide child care.

(8) "Provider" is any employee, volunteer, owner or operator of an entity who has or may have unsupervised access to children through the provision of child care.

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(9) "Authorized agency" is the office or agency designated by a State to report, receive and disseminate information under this Act.

(10) "State" includes each of the State, the District of Columbia, Commonwealth of Puerto Rico, American Samoa, Guam, and the Trust territories of the Pacific.

(11) "National Crime Information Center" is the division of the Federal Bureau of Investigation that is the source for information on criminal records, wanted criminals, runaways, missing children, and stolen property for use by Federal State and local law enforcement authorities.

REPORTING BY THE STATES

The Act establishes within the National Crime Information Center a centralized repository of standardized federal and State criminal records that States can access to provide background checks on potential and current child care providers.

The Act authorizes States to report child abuse crime information to the National Crime Information Center. The Act also authorizes the Attorney General to establish, by regulation, the reporting procedures for States, including guidelines on the format, content, accuracy and timeliness of information. The guidelines will require States to maintain child abuse crime records in a manner that facilitates background checks. The guidelines will also require that States maintain a close liaison with the National Center on Child Abuse and Neglect and the National Center for Missing and Exploited Children for the exchange of information and technical assistance in cases of child abuse.

The Act instructs the Attorney General to issue an annual statistical report on child abuse crime information using the information reported by the States under this Act. This report will help document and highlight the extent and nature of the child abuse problem in the Nation and will serve to develop effective efforts to confront the problem.

BACKGROUND CHECKS

States are authorized to utilize information from the National Crime Information Center to conduct a nationwide background check to screen child care providers and prospective providers for records of child abuse crimes.

Under guidelines established by the Attorney General, any child care organization considering an individual for employment

or as a volunteer may require the individual to sign a document that --

(1) authorizes the State to access information from the NCIC;

(2) asks whether the individual has been convicted of, arrested for or charged with a child abuse crime, and if so, asks for information about those crimes; and

(3) notifies the individual that the information provided will be subject to a background check.

The documentation will then be provided to the State, which will compare information available from the National Crime Information Center. At a minimum, the guidelines will require States to inform the child care organization whether the information from the individual was accurate.

The Attorney General may also permit further dissemination of information to and by the State consistent with the purposes of the Act.

PROMPT RESPONSE

To be in compliance, the State must provide a response to an authorized request from a provider for a background check within 14 days of receipt of the written document signed by the individual. The Attorney General may require a shorter response period if feasible.

PROTECTION FROM INACCURATE INFORMATION

The individual subject to the background check will be permitted to obtain a copy of any background report or record that is the basis for the report. The individual is entitled to challenge the accuracy of the report and to demand a prompt determination as to the validity of the information contained in the report.

EQUIVALENT PROCEDURES

The several States have adopted various laws to protect children from predatory child abusers in the non-home setting. These laws, in several instances, establish protective procedures which are the equivalent of procedures established in the Act as guidelines for all the States. The Act specifically provides that the Attorney General may certify that a State licensing or certification procedure that differs from the guidelines under the

Act shall be deemed to be the equivalent of such guidelines for purposes of compliance.

CONDITIONS ON GRANTS

Compliance with the guidelines established under the Act shall be a condition to receipt by a State of any grant, cooperative agreement, or other assistance under --

(1) section 1404 of the Victims of Crime Act (42 U.S.C. § 10603); and

(2) the Child Abuse Prevention and Treatment Act (42 U.S.C. § 5101 et seq.)

CONDITION ON EXPENDITURE OF STATE FUNDS

Compliance with the guidelines established by the Attorney General under the Act shall also be a condition for the expenditure of any State funds received under title XX of the Social Security Act (42 U.S.C. § 1397 et seq.) for staff training, administration, planning, evaluation, and technical assistance in developing, implementing or administering the State social service program.

AUTHORIZATION OF APPROPRIATIONS

The Act authorizes $100 million over three fiscal years to cover the expenses of establishing State procedures to implement the reporting of child abuse crime information and to access child abuse crime information from the National Crime Information Center.

EFFECTIVE DATES

The Attorney General is provided 180 days to issue all regulations and guidelines required by the Act. The Act provides that States have two years to come into compliance with the provisions of the Act.

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MEMORANDUM OF LAW

to accompany

The "NATIONAL CHILD PROTECTION BACKGROUND CHECK ACT OF 1991"

(An Analysis of Current Law and
Practice together with Recommendations for
Federal Child Abuse Legislation)

Governor James R. Thompson
John C. Kirtland
Edward F. Gerwin, Jr.
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Date: August 2, 1991

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I. Introduction

Each year thousands of children are abused in day care and other non-home settings. This problem is exacerbated by the absence of an effective means of identifying prospective child-care employees with records for child abuse or other serious crimes. It is particularly acute in the case of individuals who have moved from State to State.

The failure of the current system to permit effective, nationwide screening of those who care for children outside the home results from two primary flaws in current law and practice. First, the United States has no National criminal background check procedure that is uniformly accessible to child care organizations. Second, the current national crime reporting system fails to record countless child abuse crimes, and the reporting system, such as it is, often fails to obtain accurate or timely information.

This memorandum discusses legal and practical issues raised by federal legislation designed to address these problems. The discussion and analysis set forth below is based on a review of the many considerations that were relevant in drafting the National Child Protection Background Check Act of 1991. This effort included:

- a review of recent studies on child abuse, particularly child abuse in day care and other non-home settings;
- an analysis of the problems in the current child abuse reporting and State background check systems;

- a review of prior and current proposals on the registration of child abusers and background checks on child care personnel;
- an examination of other legal and practical considerations raised by proposed legislation, including existing and proposed Federal information registries, Constitutional and privacy issues, and federalism issues;
- discussions with Andrew H. Vachss, a nationally-recognized expert on child abuse, about the problem of child abuse, particularly abuse by predatory pedophiles; and
- discussions of the issue of child abuse in the non-home setting with Kenneth Lanning, an FBI expert on child abuse.

II. ANALYSIS

A. The Factual Case For Legislation

1. Child Abuse in the Non-home Setting

Child abuse in the non-home setting is a significant national problem that requires action by Congress. The problem becomes even more compelling when one looks beyond the traditional narrow focus on child day care and examines child abuse in other non-home settings, including the broad scope of voluntary and other organizations in which children come into unsupervised contact with non-related adults.

Authorities have concluded that between 100,000 and 500,000 children are sexually abused annually in the United

States.[1] The problem is reaching crisis proportions, as evidenced by a 31% increase in reported incidents between 1981 and 1990.[2] Most importantly, reliable studies indicate that sexual abuse of children is greatly underreported. Children suppress information about abusive encounters for fear of embarrassment or retaliation[3] -- one study found that perhaps less than 6% of all child molestations are reported.[4] As a result, the actual rate of sexual abuse of children is probably greatly underestimated, even by the most knowledgeable authorities.

Recent studies of sexual abuse in day care facilities indicate that for every 10,000 children in day care, approximately 5.5 are abused each year.[5] Since nearly 6 million children receive some sort of out-of-home care,[6] approximately 3,300 children each year, at the very least, are victims of abuse in day care.

1/ Fuller, Child Molestation and Pedophilia, 261 J. A.M.A. 602 (1989).

2/ The National Center on Child Abuse Prevention Research, Current Trends in Child Abuse Reporting and Fatalities: The Results of the Annual Fifty State Report 3 (Apr. 1991) [hereinafter Current Trends].

3/ Fuller, supra note 1, at 602.

4/ Fuller, supra note 1, at 603 (citing Russell, The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children, 7 Child Abuse & Neglect 133 (1983)).

5/ D. Finkelhor & L. M. Williams, Nursery Crimes: Sexual Abuse in Day Care 22 (1988). This study also estimates that 30 day care centers per 10,000 are the site of abuse annually. Id. at 21.

6/ Children's Defense Fund, The State of America's Children (1991).

Abuse in the day care setting is underestimated for a number of diverse and compelling reasons. Investigations are often inconclusive given the young age of victims.[7] Moreover, the reliability of a child's testimony is regularly challenged, and convincing allegations of abuse are dismissed.[8] The underestimation of abuse in day care is also evidenced by the restricted scope of research -- one recent study, which examined 270 reported cases, concluded that the rate of abuse in day care is not disproportionately high.[9] That sample, unfortunately, excluded all facilities serving less than 6 children.[10] Because nearly one-half of the 6 million children in day care are in family-care facilities serving less than 6 children, the study excluded the principal component of the child care sector.

Beyond documented incidence of abuse, there are strong policy reasons for giving priority attention to the day care environment. First, the number of children enrolled in day care will increase substantially -- by 1995 an expected 14.6 million pre-schoolers and 34.6 million school-aged children will have mothers in the work force.[11] Second, the quality of child care has

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7/ Finkelhor, supra note 5, at 101-02.

8/ Id. at 104, 253.

9/ Id. at 25.

10/ It is also important to note that the study was limited to cases reported between 1983 and 1985, to facilities serving at least one child under the age of seven, and abuse that had been substantiated by at least one investigatory agency. Id. at 249.

11/ Children's Defense Fund, supra note 6, at 39.

long-term effects on a child's development.[9] Children with proper care are less likely to develop behavioral problems and are more likely to develop good social and academic skills.[10] According to one academic expert, "[c]hild molestation and pedophilia are common and often overlooked syndromes that risk the child victim's well-being and further psychosocial development and adaptive functioning."[11]

The most challenging problem in the day care setting is identifying the potential molester. While the "traditional" offender is an adult male in a position of authority,[12] this profile does not predominate in day care settings. Abusers vary from experienced and trusted teachers to aides, janitors, bus drivers and relatives of employees. One recent study indicates that in 38% of reported cases, abuse was committed by a person who was not a part of the professional day care staff.[13] In addition, females, who occupy the majority of day care positions, are responsible for a significant portion of reported child abuse. This fact compounds pre-screening problems, since females are relatively less likely than males to have a history of deviant behavior.[14]

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[9] Id. at 37.

[10] Id.

[11] Fuller, supra note 1.

[12] Jong & Finkel, Sexual Abuse of Children, Current Problems in Pediatrics 498, 500 (Sept. 1990).

[13] Finkelhor, supra note 5, at 34.

[14] Id. at 40.

Child abuse concerns extend to other organized youth activities which involve extensive adult-child interaction.[3/] In the Boy Scout and Girl Scout organizations, where serious efforts are made to protect young people from abuse, recent research indicates that one scout, on average, suffers sexual abuse each week, with nearly 1,100 reported incidents over the past 19 years.[4/] Abuse in voluntary youth organizations is particularly troubling since offender recidivism, and abuse in general, are highest with crimes involving young male victims outside the home.[5/] In an effort to avoid offending adult volunteer leaders, voluntary youth organizations may be tempted to avoid criminal record checks or other pre-screening techniques. This pattern, where it occurs, invites molester access to youthful program participants. In recognition of the problem of abuse, scouting authorities have recently adopted most commendable safeguards.[6/]

Andrew R. Vachss, a nationally recognized expert on child abuse, and Kenneth Lanning, an FBI expert on child abuse, have provided further evidence on the scope and prevalence of

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3/ Other organizations expressing concerns of abuse include summer camps, Big Brother/Big Sister programs, and church groups. Priests, Big Brothers Guilty of Abuse, Too. The Washington Times, May 20, 1991, at B5.

4/ Scouting's Sex Abuse Trail Leads to 30 States. The Washington Times, May 20, 1991, at 1, col. 1.

5/ Abel, Self-Reported Sex Crimes of the Non-incarcerated Paraphiliac. 2 J. Interpersonal Violence 3, 18 (1987).

6/ Id. The current application for adult leaders asks if the volunteer has a conviction record or has ever been charged with child abuse.

child abuse in non-home situations.[1] Mr. Vachss has emphasized the prevalence of child abuse outside of the traditional day care setting. Mr. Vachss has noted that, in his experience, child abusers seek access to children in a wide number of settings. These include volunteer organizations, camps and recreational programs, children's hospitals, juvenile institutions, group homes, foster homes, drug rehabilitation programs, and child-related services (e.g., entertainers for children, child photographers, music teachers, sports instructors and coaches).

Mr. Lanning has emphasized that the majority of child abuse incidents involve family members and occur in the children's home. However, he does not underestimate the significance of child abuse outside the home. Like Mr. Vachss, Mr. Lanning has emphasized the particular risk of child abuse in volunteer and other organizations -- organizations that, unlike many child care centers, need not be licensed by the State or any other entity.

3. **The Risks Posed by Repeat Abusers**

Available information indicates that there is an extremely high rate of recidivism among child sex abusers. Child molesters do not limit themselves to a single victim or act.[2] According to Kenneth Fuller, a leading authority on this subject, "[a]n individual child molester or pedophile may commit hundreds of sexual acts on a staggering number of victims."[3] One recent

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[1] Interview with Andrew H. Vachss (June 20, 1991); interview with Kenneth Lanning (June 28, 1991).

[2] Fuller, supra note 1, at 603.

[3] Id.

study involving confidential self-reporting of crimes by molesters showed that 377 pedophiles claimed responsibility for nearly 50,000 sexual acts on over 27,000 victims[8]. Even these statistics may underestimate the problem of recidivism -- the majority of child molesters are never caught and most crimes go unreported.[9] In addition, child molesters are often victim specific and tend to abuse the same children repeatedly.[10] Given the proximity of workers to large numbers of children, day care centers and other child-related activities provide attractive opportunities for predatory recidivists.

Mr. Vachss has offered compelling testimony on the rate of recidivism among child abusers. In his experience, child abusers are equalled only by serial killers in their compulsion to repeat their pattern of criminal conduct. According to Mr. Vachss, even the most sophisticated efforts to reform child abusers have had virtually no effect on recidivism. Mr. Lanning has also noted the high rate of recidivism among predatory pedophiles. He has emphasized, moreover, that there is a very broad class of criminal offenders which poses a substantial risk to children, but which does not meet the "conventional" profile of a predatory pedophile. According to Mr. Lanning, sex offenders

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[8] Abel, Rubin note 21, at 19.

[9] According to one study, sexual offenders may commit 3-6 times more crimes than their arrest records indicate. Hall, Criminological Predictors of Recidivism in a Sexual Offender Population, 55 J. Consulting & Clinical Psychology 111, 111-12 (1987) (citing Groth, Undetected Recidivism Among Rapists and Child Molesters, 28 Crime and Delinquency 450 (1982)).

[10] Id.

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are often indiscriminate -- they do not care if their victims are adults or children. In Mr. Lanning's experience, an individual who has a history of other serious offenses, including drug-related and violent crimes, will pose a significant risk of committing child abuse. Such an individual, in law-enforcement parlance, lacks the necessary "impulse control" that society expects of those to whom children are entrusted.

3. **Problems With the Current Methods of Screening Child Care Providers**

As discussed in greater detail below, there are a variety of problems with current systems for reporting child abuse crimes and conducting background checks on persons who have contact with children outside the home. Congressional and other experts on child abuse have repeatedly pointed to the inability of these systems to prevent persons with a history of child abuse or other serious offenses from obtaining access to children in the non-home setting. This problem is particularly acute in instances where offenders have moved from State to State. In a recent Senate floor statement, Senator Mitch McConnell (R-KY) cited examples of persons who had gained positions of authority over children despite the fact that they had previously been convicted of child abuse in another State.[8] These included the case of a Maryland school psychologist who was convicted of child molestation. The individual later moved to Virginia, where he obtained a position as a school psychologist and was later

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[8] 137 Cong. Rec. S8,888-89 (daily ed. June 27, 1991) (statement of Sen. McConnell).

arrested and charged with the molestation of 15 elementary school students. Andrew Vachss has reported comparable cases where child abusers have gained repeated access to children in the non-home setting simply by moving across State lines.

Current procedures fail to detect repeat offenders. First, the States generally do not have systems that permit most child care and related organizations to obtain the benefit of a national criminal record background check. As explained below, States generally require or permit background checks only for offenses committed within the State. In addition, some States require or permit background checks only for limited offenses involving children. Moreover, background check procedures under the laws of many States are required or available for no more than narrowly-defined classes of child care centers (e.g., centers serving more than a certain number of children).

Second, State restrictions on the release of criminal history information may prevent or hinder background checks. For example, some State systems seek to protect the privacy of applicants by disclosing criminal record information only to State licensing authorities. Such systems may restrict access to a background check by voluntary and other organizations not subject to State licensing requirements unless the State has established separate access procedures for such organizations.

Third, some States have provided for nationwide criminal records checks for child care workers, but lack the funding to

place such systems in operation.[8] Mr. Lanning has emphasized that lack of funding is typically a problem with background check and other statutory programs.

Fourth, not all crimes relating to child abuse are reported by the States to the FBI. For example, according to Andrew Vachss, it is common for individuals accused of a "child abuse" crime to plead, as a result of a plea bargain, to some other crime that does not carry the stigma of a child abuse offense.

Finally, as discussed below, the FBI's traditional system for State reporting of crimes is flawed in a number of respects. Under this system, reporting crimes and assuring the accuracy and timeliness of information is largely the responsibility of the States -- the FBI generally plays a passive role. As a result, State crime information reflected in the FBI's records is incomplete and inaccurate. Although most child abuse crimes are considered "serious offenses" and thus should be reported under the FBI system, the passive nature of the FBI's role gives no assurance that such crimes are, in fact, reported. The FBI is taking steps to correct this situation.

9. Past And Current Proposals

Since the early 1980s, there has been a series of proposals before Congress to improve detection of child abusers and other criminals before they gain access to children in the

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[8] Interview with Robert Moore, Children and Family Services Division, State of Illinois Government (July 10, 1991).

non-home setting.[1] A number of such proposals were introduced but never enacted. One proposal was enacted, but apparently failed to work in practice. Quite recently, similar proposals have been introduced in Congress.

1. Early Proposals

In response to the report of a 1982 Presidential task force on victims of crime,[2] various federal legislators introduced bills to provide for the screening of potential child abusers in the child care setting. In early 1983, Sen. Arlen Specter (R-PA) introduced legislation to prohibit employment of any individual in juvenile detention, care, correction or treatment facilities unless the individual was screened through a "nationwide criminal record check" conducted through the FBI.[3] Later that year, Sen. Charles Grassley (R-IA) proposed the establishment of a child molestation and sex crime file and a system under which prospective employers would be notified promptly of convictions and certain arrests contained in the file.[4] Additional proposals to require screening of child care providers were introduced in 1984.[5] None of these bills was enacted into law.

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[1] See generally Davidson, Protection of Children Through Criminal History Record Screening: Well-Meaning Promises and Legal Pitfalls, 99 Dick. L. Rev. 577 (1985).

[2] President's Task Force on Victims of Crime, Final Report (Dec. 1982).

[3] S. 521, 98th Cong., 1st Sess., 129 Cong. Rec. S1,324 (1983).

[4] S. 1924, 98th Cong., 1st Sess., 129 Cong. Rec. S13,638 (1983).

[5] H.R. 5484, 98th Cong., 2d Sess. (1984) (Rep. Ralph Regula) (screening for sex offenses with children, denial of financial (continued...)

2. The Miller-DeConcini Law

In 1984, Congress authorized an appropriation of $25,000,000 to be made available to the States for training child care personnel.[B/] This legislation resulted from the efforts of Rep. George Miller (D-CA) and Sen. Dennis DeConcini (D-AZ). It required, as a condition to receipt of federal funding, that States have in effect, not later than September 30, 1985, procedures for employment history or background checks, together with State laws requiring nationwide criminal record checks of specified child care personnel.[B/] The law also directed the Department of Health and Human Services to develop a Model Child Care Standards Act for the States. Upon its promulgation, the Model Act described procedures for State and national background checks, but did not provide guidance to the States in choosing among the various options.[B/]

[B/] (...continued)
assistance to agencies utilizing services of persons convicted of child sex crime); S. 2973, 98th Cong., 2d Sess., 130 Cong. Rec. S10,833 (1984) (Senators Al D'Amato and Paula Hawkins) (comprehensive proposal including child abuse registry, requirements tied to Social Security Act funding).

[B/] Comprehensive Crime Control Act of 1984, Pub.L. 98-473, § 401, 98 Stat. 11,837 (1984).

[B/] Pub.L. 98-473, § 401(2)(a).

[B/] Department of Health and Human Services, Model Child Care Standards Act -- Guidance to States to Prevent Child Abuse in Day Care Facilities (1985) [hereinafter Model Child Care Standards Act]. See also, Phillips, The Federal Model Child Care Standards Act of 1985: Step in the Right Direction or Hollow Gesture?, 1 Am. J. Orthopsychiatry 56 (1986). Subsequently, the Department of Health and Human Services promulgated regulations under the National Child Abuse and (continued...)

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The promise of the Miller-DeConcini program has not been fulfilled in practice. Only a limited number of States enacted the required procedures, and the federal program was not funded beyond fiscal year 1985.[9]

3. Recent Initiatives

There have been a number of recent Congressional proposals concerning child abuser registration and screening. In May, Sen. Mitch McConnell (R-KY) introduced a proposal to encourage States to report child abuse crime information to the FBI's National Crime Information Center.[10] Subsequently, Senator David Durenberger (R-MN) introduced a bill to establish a federal system under which convicted child abusers would register their addresses for 10 years after their release from prison, parole or supervision.[11] Both bills would encourage State cooperation by

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[9] (...continued)
Prevention Treatment and Adoption Reform, 42 U.S.C. § 5101 et seq. These regulations require states receiving grants under that act to provide by statute "that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." 45 C.F.R. § 1340.14(i)(1). However, if a state chooses, "it may authorize by statute disclosure to additional persons and agencies, as determined by the State, for the purpose of carrying out background and/or employment-related screening of individuals who are or may be engaged in specified categories of child related activities or employment." 45 C.F.R. § 1340.14(i)(3). Information disclosed for background check purposes is subject to the confidentiality requirements of 45 C.F.R. § 1340.14(i)(1), and "may be subject to additional safeguards as determined by the State." 45 C.F.R. § 1340.14(i)(3).

[10] House Ways and Means Committee, Committee Print 102-9, Overview of Entitlement Programs, § 10, at 773.

[11] S. 1008, 102d Cong., 1st Sess. (1991).

[12] S. 1170, 102d Cong., 1st Sess. (1991).

making compliance a condition of receiving certain funding relating to victims of crime and child abuse prevention. Both the McConnell and Durenberger proposals were adopted as amendments to the recently-passed Senate omnibus crime bill.[1/] Although a House companion bill to the McConnell bill has been introduced,[2/] the House has not acted on either the bill or the omnibus crime legislation.

The Senate defeated a relevant amendment offered by Sen. Ted Stevens (R-AK) to the omnibus crime bill. The Stevens amendment, which dealt primarily with the establishment of an "instant check" system for firearms purchasers, would have permitted child care facilities to employ that system for background checks on prospective employees. The proposal would have required that the prospective employee sign a written authorization for the national background check. The Stevens amendment was defeated because of opposition to the firearms provisions, rather than opposition to the child care screening provisions.

1/ 137 Cong. Rec. S8,568-8,615 (daily ed. June 27, 1991).

2/ H.R. 2553, 102d Cong., 1st Sess. (1991) (Rep. David Robson (R-OH)). (Rep. Robson has recently introduced a slightly revised bill, H.R. 2931, 102d Cong., 1st Sess.).

c. Legal And Practical Considerations

1. State Criminal History Checks for Child Care

Existing State laws are inadequate to protect America's children from child abuse outside the home. This is because States presently do not have the ability to obtain uniform background check information from other States. A twenty-five State survey reveals that State laws vary greatly in terms of (1) background check procedures; (2) the type of information contained in the check; (3) the individuals and organizations subject to background check requirements; (4) the consequences of adverse findings; (5) the right of access to background check information; and (6) the ability to challenge background check results. The following section discusses these inconsistencies, and demonstrates the need for a cohesive federal strategy.

a. Background Check Requirements

Of twenty-five States surveyed, twenty-two have enacted legislation that either mandates a criminal history check or permits access to criminal information systems in order to screen people who will have substantial contact with children.[*] Where mandated, the background check is commonly a prerequisite to obtaining or renewing a license to operate a child care facility. For example, California, Georgia, South Dakota, and Minnesota require background checks for both the license applicant and the

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[*] Of the 25 States surveyed, the 22 which had legislation providing for background checks are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Minnesota, Mississippi, Nevada, New Hampshire, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, and Washington.

staff of the facility before issuing a license.[8] Likewise, New Hampshire mandates a check for the license applicant. Although checks for employees are not expressly required, information regarding the employees' history may be cause for denial of the license.[9] Further, in States such as Florida and Illinois, the issuance of a new license is dependent only upon the background check of the license applicant;[10] the employee check is mandated separately as a condition of employment.

In addition to establishing a special State registry to screen child care providers, Tennessee mandates a computer check to verify the accuracy of self-reported criminal history information. Thus, non-disclosure of any felonies, including any sexual offense not expunged by law, is punishable in its own right. The statute does not, however, discuss the consequences of past sexual offenses on obtaining employment as a child care provider.[11]

In contrast, States such as Iowa, Colorado, and Connecticut simply provide that a record of conviction or charges

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[8] Cal. Health & Safety Code § 1596.871 (Deering 1990); Ga. Code Ann. § 49-5-60 (1989); S.D. Codified Laws Ann. § 26-6-14.3 (1991); Minn. Stat. § 245A.04, Subd. 3 (1991).

[9] N.H. Rev. Stat. Ann. § 170-E:4 (1987).

[10] Fla. Stat. Ann. § 402.3055 (West 1991); Ill. Rev. Stat. ch. 23, para. 2214.1 (1989).

[11] Tenn. Code Ann. § 71-3-529(a)(4) (1990).

of founded child abuse may be grounds for denial of a license, without mandating a background check explicitly.[9]

Tennessee, Illinois, Florida, and Rhode Island[10] require a check for personnel of child care facilities directly as a condition of employment. Arizona requires personnel to register with the State in order to work in a day care center; registration is conditioned on the results of a fingerprint check.[11] In Pennsylvania, applications for child care jobs must be accompanied by certification that a background check showed no founded reports of child abuse.[12] In addition, some States require criminal background checks for certain employees of the State, but not the private sector. For example, Nevada conditions teacher certification on background checks,[13] while Delaware and Washington require the checks for child care personnel employed by the State.[14]

In contrast, States such as Texas, Washington, Mississippi, Kentucky, and Alaska authorize employer access to

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[9] Iowa Code § 237A.5 (1991); Colo. Rev. Stat. § 26-6-108(2)(f) (1990); Conn. Gen. Stat. § 17-56d (1991).

[10] Tenn. Code Ann. § 71-3-529 (1990); Ill. Rev. Stat. ch. 23 para. 2214.1 (1989); Fla. Stat. Ann. § 402.305(3)(1991); R.I. Gen. Laws § 16-48.1-5 (1990).

[11] Ariz. Rev. Stat. Ann. § 36-883.02 (1990).

[12] 11 Pa. Cons. Stat. § 2223.1(b) (1988).

[13] Nev. Rev. Stat. § 391.033 (1989).

[14] Del. Code Ann. tit. 31 § 309 (1990); Wash. Rev. Code § 43.43.830 (1990).

crime information regarding prospective employees, but do not mandate this investigation.[9]

The proposed legislation which accompanies this memorandum, the National Child Protection Background Check Act of 1991, authorizes States to use information from the National Crime Information Center to conduct nationwide checks. The legislation encourages States to participate under the Act by conditioning grants on participation, and by authorizing the expenditure of federal funds to cover the expenses of establishing State procedures for nationwide checks. As discussed in greater detail below, the proposed legislation establishes minimum standards for compliance.

b. Nature of the Check

The procedural aspects of background checks are divided along two lines: the information used to identify the subject and the scope of the search. First, while the most common scheme for identifying subjects involves a standard investigation (presumably by name and social security number), States such as Alaska, Florida, Georgia, California, Delaware, Arizona, South Dakota, Nevada, and Rhode Island require fingerprints to be submitted.[10]

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[9] Tex. Hum. Res. Code Ann. § 22.006(d) (Vernon 1991); Wash. Rev. Code § 43.43.832 (1990); Miss. Code Ann. § 45-31-5 (1990); Ky. Rev. Stat. Ann. § 17.160 (Michie 1991); Alaska Stat. § 12.62.035 (1990).

[10] Alaska Stat. § 12.62.035(b) (1990); Fla. Stat. Ann. § 402.3055 (West 1991); Ga. Code Ann. § 49-5-64 (1989); Cal. Health & Safety Code § 1596.871 (Deering 1990); Del. Code Ann. tit. 31 § 309(d) (1990); Ariz. Rev. Stat. Ann. § 36-883.02(B) (1990); S.D. Codified Laws Ann. § 26-6-14.5 (1991); Nev. Rev. Stat. Ann. § 391.033(2) (1989); R.I. Gen. Laws § 16-48.1-5 (1990).

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With regard to the scope of the search, while most statutory checks provide for investigations through State criminal history records generally, some States limit the search to registries which contain only crimes against children. Tennessee has even established a separate registry to screen child care providers. This registry contains only allegations of sexual or severe abuse of a child.[15] On an encouraging note, a number of States now provide for nationwide screening. For example, Rhode Island, Florida, Minnesota, South Dakota, and Illinois require information from federal criminal history repositories.[16] While Pennsylvania mandates investigation of only the State registry generally, prospective employees who are not residents of the State must undergo an FBI record check.[17] Georgia requires a federal fingerprint check for directors of child care facilities, but only State checks based upon information other than fingerprints for their employees.[18] Furthermore, the screening requirements of Nevada and Delaware relating to teachers and State child care personnel, respectively, also require investigation through the FBI.[19]

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[15] Tenn. Code Ann. § 37-1-408 (1990).

[16] R.I. Gen. Laws § 16-48.1-5 (1990); Fla. Stat. Ann. § 402.3055 (West 1991); Minn. Stat. § 245A.04, Subd. 3(c) (1991); S.D. Codified Laws Ann. § 26-6-14.5 (1991); Ill. Rev. Stat. ch. 23 para. 2214.1 (1989).

[17] 11 Pa. Cons. Stat. § 2223.1 (1990).

[18] Ga. Code Ann. §49-5-64 (1989).

[19] Nev. Rev. Stat. § 391.033 (1989); Del. Code Ann. tit. 31 § 309 (1990).

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State laws that limit the information used to identify a subject or that provide only for statewide searches do not address adequately the problem of child abuse in organized settings. The flaws in such legislation are evident. First, an individual with criminal convictions for violence may evade detection if searches are limited to child abuse registries. Similarly, an individual with a history of child abuse or violence in another State will not be identified by a statewide background check. For these reasons, the National Child Protection Background Check Act of 1991 encourages States with such restrictions to expand their legislation to require searches of nationwide criminal history records.

c. What Information is Sought?

Some States focus their searches more narrowly than others. The Tennessee registry, discussed above, only provides information relating to the sexual or other severe abuse of children.[61] However, Tennessee still requires a check to verify the accuracy of a much broader category of self-reported crimes.[62] California allows more expansive screening: the conviction of any crime, other than a minor traffic violation, may be grounds to deny a child day care license.[63] Georgia requires a report of "any

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[61] Tenn. Code Ann. § 37-1-408 (1990).

[62] Tenn. Code Ann. § 71-3-529 (1990).

[63] Cal. Health & Safety Code § 1596.871(a) (Deering 1990).

derogatory finding, including but not limited to any criminal record".[3]

The list of crimes to be screened for in other States includes: public indecency, felony possession or distribution of a controlled substance;[4] offenses against children or other persons, civil adjudications of child abuse, disciplinary board final decisions;[5] homicide, aggravated assault, kidnapping, unlawful restraint, rape, statutory rape, involuntary deviant sexual intercourse, indecent exposure, offenses relating to prostitution, and offenses relating to obscene materials.[6]

State statutes may specify the basis on which employment or a license may be denied, rather than the scope of the search itself. For example, Pennsylvania requires certification that the applicant is not named in the State register as the perpetrator of a founded or indicated report of child abuse.[7] Under New Hampshire law, a license will be denied if the applicant has been convicted of a crime against a minor or a crime which "shows that a person might reasonably be expected to pose a threat to a child."[8]

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[3] Ga. Code Ann. § 49-5-64 (1989).

[4] Tex. Rev. Civ. Stat. Ann. § 22.006(d) (Vernon 1991).

[5] Wash. Rev. Code § 43.43.832(1) (1990).

[6] 11 Pa. Cons. Stat. §§ 2223.1(a) (1988).

[7] 11 Pa. Cons. Stat. § 2223.1(b)(2) and (3) (1988).

[8] N.H. Rev. Stat. Ann. § 170-E:4 (III) (1987).

This information may not be comprised solely of conviction records. Colorado allows a license to be denied based on convictions, deferred judgment agreements,[D] or the individual's admission of child abuse or sexual offenses. Furthermore, an unadmitted charge may be grounds for denial in Colorado if an administrative law judge finds that it is supported by substantial evidence.[D] In addition, in Mississippi, all sex offense criminal history information will be released if the record check indicates a sex offense conviction, a sex offense charge pending at the time of the check, or at least two incidents resulting in the arrest or initial charge for a sex offense.[D]

New York provides greater restrictions on the use of nonconviction information. The New York Department of Social Services will only inform the child care licensing agency of an indicated report of child abuse if the time for amendment or expungement of the record has passed or if a request for amendment or expungement has been heard and denied. Moreover, the department then makes an independent evaluation of the allegations of child abuse. If no credible evidence is found, the record is expunged and the inquiring agency is notified that the search produced no child abuse history. Further, even if credible evidence supporting the allegations is found, the New York agency then determines whether the acts of abuse are "relevant and

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[D] Colo. Rev. Stat. § 26-6-104(7) (1990).

[D] Id. at § 26-6-108(2)(K) (1990).

[D] Miss. Code Ann. § 45-31-11(4) (1990).

reasonably related to issues concerning the employment of the subject . . . or the subject being allowed to have substantial contact with children...."[2]

As demonstrated above, the States surveyed have differing views about the types of information that should be covered by background check legislation. These differences reflect the legitimate interests of the States in balancing the obligation to protect children from child abusers with the privacy interests of the individual. These differing approaches are consistent with the purposes of the proposed federal legislation as long as the minimum requirements set forth in the bill are met. Beyond that, if States decide to include more background check information than specified in the proposed Act, the Act does not prevent them from doing so.

d. Who is covered?

The applicability of current State laws varies regarding both the institutions and the individuals covered. The criminal history check requirement is commonly linked to a licensing requirement for child care facilities. Therefore, its scope is limited to the coverage of the licensing statute. For example, Connecticut licensing requirements encompass child day care centers of more than twelve children kept for at least one day a week and family day care homes with six or less children.[3] Florida defines a child care facility as one that cares for five

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[2] N.Y. Social Services Law § 424-a(e) (1991).

[3] Conn. Gen. Stat. § 19a-77(a) (1991).

or more children, whether or not for profit.[5] Tennessee provides an even less inclusive definition, requiring the presence of thirteen or more children to constitute a day care center, although between five and seven may comprise a family day care home.[6] Illinois applies its licensing requirements to facilities that receive only one or more children for care.[7] Although providers are not required to obtain a license in Washington, the State provides a broad spectrum of licensed organizations that may access criminal history information. These organizations include those which educate, train, treat, supervise, or provide recreation to children.[8]

States that tie the criminal history requirement directly to employment of child care personnel may place similar restrictions on its applicability. For example, Rhode Island's child care certification requirement for employees applies only to "private nursery schools and other programs of educational services to children between the ages of 3 years, 9 months, and 6 years of age", but not classes which are part of a non-public elementary school systems.[9] Among the programs which States exempt from coverage are: Bible schools, nursery services provided by religious institutions in conjunction with religious

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[5] Fla. Stat. Ann. § 402.302(4) (West 1991).

[6] Tenn. Code Ann. §§ 71-3-501(b)(4) and (7) (1990).

[7] Ill. Rev. Stat. Ch. 23 para. 2214 (1989).

[8] Wash. Rev. Code § 43.43.830(2) (1990).

[9] R.I. Gen. Law § 16-48.1 (1990).

services, regularly organized private schools, such as kindergarten, facilities that train in specific subjects, facilities operated in connection with a business where children are cared for during short periods while parents patronize the business, and occasional, rather than regular care of children.

In determining which individuals are subject to screening requirements, the most common statutory scheme applies to people with direct contact and supervision over children. For example, Rhode Island requires a criminal record check for employment which "involves supervisory or disciplinary power over a child or children or involves routine contact with a child or children without the presence of other employees."[5] Washington provides a similar definition, but limits it to access to children younger than 16 years. Unlike Rhode Island, the Washington statute also applies to volunteers who will have unsupervised access to those groups if they are found in smaller numbers.[6] California imposes a background check requirement on administrators, persons who provide care and supervision to children, and on any employee or staff person who has "frequent and routine contact" with the children. However, those staff persons who have supervised access to the children and who do not provide direct care are exempted. Further, volunteers are

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[5] Id. at § 16-48.1-5 (1990).

[6] Wash. Rev. Code § 43.43.830(1) (1990). This statute also applies to those who may have access to developmentally disabled persons or senior citizens who are unable to care for themselves.

exempted if they do not provide direct care and supervision.[a] Florida exempts volunteers who work less than 40 hours per month, as long as they have constant supervision.[b]

Washington, Pennsylvania and Kentucky cover only prospective employees, not those currently employed.[c] Pennsylvania further narrows the scope of its statute by exempting employees under 21 years, those employed for 90 days or less, and those who are part of job training programs.[d] By contrast, Florida and California have extended the application of their requirements to include residents of the covered facilities.[e] For example, Florida requires any person over the age of 12 years who resides with the operator of a day care facility located in or adjacent to the operator's home to meet background check requirements. Even if the facility is not located in the operator's home, family members must be screened if they have any direct contact with the children during hours of operation. Although exempted from fingerprinting, members of the operator's

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[a] Cal. Health & Safety Code § 1596.871(b)(3) and (4) (Deering 1990).

[b] Fla. Stat. Ann. § 402.302(8) (West 1991).

[c] Wash. Rev. Code § 43.43.830(1) (1990); 11 Pa. Cons. Stats. § 2223.1(a) (1988); Ky. Rev. Stat. Ann. § 17.160 (Michie 1991).

[d] 11 Pa. Cons. Stat. § 2223.1(a) (1988).

[e] Fla. Stat. Ann. § 402.302(8) (West 1991); Cal. Health & Safety Code § 1596.871(b)(2) (Deering 1990).

family between the ages of 12-18 years, who meet the above criteria, must be screened for delinquency records.[87]

The problem with State laws that restrict coverage is that individuals with histories of child abuse or violence still are able to gain employment in child care. The draft legislation would prevent such occurrences by covering a wide range of organizations and, not only those individuals who are responsible for the care of children, but other individuals such as bus drivers or janitors, who have unsupervised access to children.

e. Consequences of the Background Check

While some States mandate or authorize a background check without specifying how the relevant State agency should use that information, others address the effects that an incriminating record check may have. For example, Georgia, South Dakota and Pennsylvania absolutely prohibit the employment of someone who receives an unsatisfactory record check.[88] New York and Connecticut grant discretion to the State licensing agency to determine whether a license will be issued in spite of a criminal history. Like New York, discussed above,[89] the licensing agency in Connecticut may deny a license if the commissioner reasonably believes that the criminal record "renders the person unsuitable"

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[87] Fla. Stat. Ann. § 402.302(8) (West 1991).

[88] Ga. Code Ann. § 49-5-61 (1989); S.D. Codified Laws Ann. § 26-6-14.3 (1991); 11 Pa. Cons. Stat. § 2223.1(d) and (e) (1988).

[89] N.Y. Social Services Law § 424-a(e) (1991).

to own or be employed by a child care facility.[9] Although Colorado and Iowa do not expressly require background checks, they may deny a license based on criminal convictions by the licensee or an employee.[10]

California prohibits the licensure or employment of persons who have been convicted of a sex offense against a minor or a felony of any kind, but the statute contains a "loophole." The director of the licensing agency has discretion to grant an exemption if he or she has "substantial and convincing evidence to support a reasonable belief that ...the person convicted of the crime...[is] of such good character as to justify ...an exemption." The director, however, has no discretion to grant an exemption if the conviction was for a sex offense, cruelty to a child, lewd or lascivious acts involving children, or a violent felony.[11]

The draft legislation accompanying this memorandum does not require organizations to take specific actions upon receipt of adverse background check information. The resolution of this issue has been left to the discretion of the States. As a practical matter, once background check information becomes available on a nationwide basis, it is probable that a "standard of care" will develop within the child care industry and thus, legislative mandates may not be necessary.

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[9] Conn. Gen. Stat. § 17-588(a) (1991).

[10] Colo. Rev. Stat. § 26-6-108(2) (1990); Iowa Code § 237A.5(2) (1991).

[11] Cal. Health & Safety Code § 1596.871(e) (Deering 1990).

f. **Who May Access Criminal History Information?**

In States that condition child care licensing on employee criminal history checks, the licensing agency submits the information for screening. The employer may then be informed of the result of this check so that it can act accordingly. Other States take greater steps to protect the privacy of the individual.

South Dakota, Georgia, and Rhode Island notify employers that the check produced disqualifying information: they do not provide the details of the record.[9/] In Rhode Island, only the prospective employee actually learns the nature of the disqualifying information. Although Mississippi does allow the release of sex offense criminal history information to employers, the employers must first be authorized to receive such information. In order to be authorized, the employer must submit a plan for safeguarding information received and for its destruction within 30 days of receipt. The plan must be kept up to date for the five-year term of authorization. Once authorized, the employer may request information directly from State and local safety offices, but only with the signed consent of the employee.[9/]

California, Kentucky, and Arizona, which allow screening of child care providers, provide more liberal access to criminal history information. For example, California authorizes access to criminal history information in addition to its screening

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[9/] S.D. Codified Laws Ann. § 26-6-14.5 (1991); Ga. Code Ann. § 49-5-63; R.I. Gen. Laws § 16-48.1-5 (1990).

[9/] Miss. Code Ann. § 45-31-9 (1990).

requirement for licensing. While the licensing agency submits fingerprints to satisfy the latter, either a human resource agency or an employer may request records of convictions or arrests pending trial for a person who would have supervisory or disciplinary power over a child.[9/] Kentucky allows employers to request sex crimes convictions directly, as long as the potential employee is also furnished a copy of the information.[10/] Although Arizona mandates criminal history checks for day care workers, it authorizes such checks for any employee or volunteer who will have regular contact with minors under 15 years of age. Information regarding sex offense convictions may be released to the employer or volunteer agency.[11/]

Alaska allows even broader access. "An interested person" may request records of felony convictions, convictions for contributing to the delinquency of a minor, and sex crime convictions for employees who hold or have applied for a position with supervisory or disciplinary power over a child or dependant adult. Because the person making the request must provide fingerprints of the person being screened, the search may only be accomplished with consent.[12/] Washington authorizes public agencies to "release relevant and necessary information regarding sex offenders to the public when the release of such information is

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9/ Cal. Penal Code § 11105.3(a) (Deering 1990).

10/ Ky. Rev. Stat. Ann. § 17.160(1) (Michie 1991).

11/ Ariz. Rev. Stat. Ann. § 41-1750(B)(11) (1990).

12/ Alaska Stat. § 12.62.035(a) and (b) (1990).

necessary for public protection.[9] The public agency is immune from civil liability for such disclosure unless they act with gross negligence or in bad faith.[10]

As with the scope of crimes covered by background checks, discussed above, the diversity in State laws regarding right of access reflects the tension between full disclosure and the right of privacy. The proposed National Child Protection Background Check Act of 1991 establishes a minimum requirement that a State agency inform a requesting child care organization whether background information supplied by the individual is accurate. Beyond that, States may permit further dissemination, consistent with the purposes of the proposed Act.

g. Redress for Inaccurate Information

At least one State, Alaska, provides an opportunity to appeal inaccurate findings. This compensatory, rather than preventative, measure allows an individual to sue the State if denied employment as a result of the disclosure of inaccurate or incomplete information.[11] In Florida, by contrast, the person being screened is responsible for supplying missing information, such as disposition information, to the local licensing agency. Failure to supply or to show a reasonable effort to obtain this information results in automatic disqualification.[12] The proposed legislation permits an individual to obtain a copy of a background

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[9] Wash. Rev. Code § 4.24.550(1) and (2) (1990).

[10] Alaska Stat. § 12.62.035(d) (1990).

[11] Fla. Stat. Ann. § 402.3055(3)(a) (West 1991).

check or any information forming the basis of the background check. The individual is entitled to challenge the accuracy of a background check, and no adverse action can be taken against the individual until the challenge has been resolved.

h. **The Implications for Proposed Federal Legislation**

This review of existing State systems presents a number of elements that have been considered in the development of the National Child Protection Background Check Act of 1991. As noted above, State programs vary widely in scope and effectiveness. These programs also differ significantly as to the confidentiality of information and the extent to which information can be disseminated. As a result, the draft legislation attempts to remedy the deficiencies in State programs while, at the same time, providing flexibility to the States.

The goal of preventing potential child abusers from gaining access to their victims is best served by broad-coverage legislation that require checks on all persons who will have unsupervised access to children. Rather than limiting its scope to licensed child care facilities, the draft legislation includes the many organizations that train, educate, supervise, and provide recreation to children. This broad approach will permit the screening of teachers, employees of State social service agencies who have direct contact with children, foster parents, and volunteers for programs such as the Boy and Girl Scouts and Big Brother/Big Sister. For similar reasons, background checks will

not be limited to child abuse crimes but will include a broader list of offenses that may indicate a potential to harm a child.

States can accomplish the goal of preventing offenders from perpetrating further abuse through nationwide fingerprint checks. Although administrative costs will be greater, fingerprint checks are more accurate than name checks and can be accomplished through local law enforcement agencies. The draft legislation encourages the use of fingerprints and any other advanced technology that becomes available.

2. Crime Reporting and Other National Registration Systems

There are a variety of problems with the FBI's current national system for the reporting of crimes. This section reviews the current FBI system and other current and proposed national registries for screening purposes. It then discusses the implications of these various systems for child care screening legislation.

a. The National Crime Information Center

The National Crime Information Center ("NCIC") is a computer database system under the control of the Federal Bureau of Investigation ("FBI"). The NCIC links criminal justice agencies at all levels of government throughout the United States. Through the NCIC, authorized law enforcement officials or government agencies can obtain information on wanted persons, stolen items, or criminal history records. All fifty States now participate in the NCIC.

1. Procedures for State Participation in the NCIC

To participate in the NCIC system, a State must conform to an FBI User Agreement and follow the procedures, policies, and regulations contained in an FBI Operating Manual. When a State joins the NCIC, the User Agreement creates a State agency known as a Control Terminal Agency ("CTA"). The CTA is responsible for NCIC operations in that State and ensures that system procedures and policies are followed.[10/] Telecommunications lines and equipment within the State provide State and local criminal justice agencies access to the control terminal.[11/] There are approximately 37,000 terminals at 17,000 locations across the United States.[12/]

With regard specifically to Computerized Criminal History ("CCH") files (discussed in more detail below), FBI regulations state that criminal justice agencies desiring access to CCH files "shall execute a signed agreement with the Director, FBI, to abide by all present rules, policies and procedures of the NCIC, as well as any rules, policies and procedures hereinafter approved by the NCIC Advisory Policy Board and adopted by the NCIC."[13/] For States that participate in the Interstate

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[10/] The CTA is connected directly to the NCIC. Department of Justice, Office of Justice Programs, Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms 91, 54 Fed. Reg. 26,902 (1989) [hereinafter Firearms Report].

[11/] Id.

[12/] Id.

[13/] 28 C.F.R. § 20.36(a).

Identification Index ("III"), a more decentralized criminal history system which may eventually replace the CCH, the FBI also requires CJA's to sign written agreements stating that they will conform to the rules, policies, and procedures governing III operations.[136]

ii. Computerized Criminal Histories and the Interstate Identification Index

One of the files that may be accessed through the NCIC is the Computerized Criminal History File. FBI regulations describe the CCH as a "cooperative Federal-State program for the interstate exchange of criminal history record information."[137] The CCH provides a central repository and index of criminal history record information for the purpose of facilitating the interstate exchange of such information among criminal justice agencies.[138] Offenses recorded in the CCH file include "serious and/or significant offenses."[139] State child abuse crimes generally are considered serious and/or significant offenses for purposes of the CCH file. The file does not include "non-serious" charges, such as drunkenness, disturbing the peace, traffic violations, and non-specific charges of suspicion or

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136 Department of Justice, Federal Bureau of Investigation, Interstate Identification Index Status Report 4 (1988) [hereinafter III Status Report].

137 28 C.F.R. § 20.31(a).

138 Id.

139 28 C.F.R. § 20.32(a).

investigation.[110] The FBI Identification Division maintains a master fingerprint file on all offenders included in the CCH.[111] The FBI takes an average of 14 days to process a criminal history fingerprint check.[112]

The FBI accepts the entry of criminal record history information into the CCH file only from an authorized State or federal criminal justice control terminal.[113] In practice, the FBI plays a largely passive role in receiving data from local police agencies, maintaining the computer system, and disseminating the information.[114] Thus, it is the responsibility of the federal agencies and States participating in the CCH file to report data, and to assure accuracy of data.

The NCIC has also developed the Interstate Identification Index, designed as an eventual replacement for the CCH file. Unlike the CCH file, which maintains all records in a central repository, the III is a more decentralized system where full criminal histories are retained in the NCIC system only for federal offenders. In the III system, the NCIC maintains a list or index of State offenders, supported by fingerprints and a State

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[110] 20 C.F.R. § 20.32(b).

[111] 20 C.F.R. § 20.31(c).

[112] Model Child Care Standards Act, supra note 37, at 32.

[113] 20 C.F.R. § 20.36(b).

[114] Note, Data Accuracy in Criminal Justice Information Systems: The Need for Legislation to Minimize Harm, 6 Computer L. J. 677, 714 (1986).

Identification Number ("SID").[115] The actual histories of State offenders, however, are kept in State computer systems.[116]

The NCIC system provides direct, electronic access to the III records in the participating States, and to the FBI Identification Division's automated records.[117] When a request is sent by a State to the NCIC, the NCIC checks the FBI Identification Division records and also forwards the request to any States in which the III indicates that a criminal history record exists.[118] Those States then send the information in their records through the National Law Enforcement Telecommunications System, Inc. ("NLETS") back to the originating State.[119] Records are generally available in minutes, and as of 1988, about 900,000 inquiry transactions were processed each month.[120]

As of March 1991, twenty States participated in the III system, and twenty-two additional States reported that they plan to participate within the next five years.[121] Six States and the District of Columbia do not plan to participate in III within the next five years, and the plans of the three remaining States are

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[115] III Status Report, supra note 106, at 1.

[116] 6 Computer L.J. at 680.

[117] Firearms Report, supra note 102, at 91.

[118] III Status Report, supra note 106, at 1.

[119] Id.

[120] Id.

[121] Department of Justice, Survey of Criminal History Information Systems 7 (Mar. 1991).

currently unknown.[22] At the present time, however, States may not use the III for non-criminal justice purposes, such as employment background checks, due to widely varying State laws on the dissemination of data.[23]

iii. Procedures Regarding Dissemination of NCIC Criminal History Data

The statutory basis for the regulations regarding the release of criminal history records is 28 U.S.C. § 534(a), which states that "The Attorney General shall ... exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions."

FBI regulations permit dissemination of NCIC criminal history records for various criminal justice purposes, and for "use in connection with licensing or local/State employment or for other uses only if such dissemination is authorized by Federal or State statutes and approved by the Attorney General of the United States."[24] The Attorney General delegated the authority to the Director of the FBI to "approve and conduct exchanges of identification records ... if authorized by State statute and approved by the Attorney General, to officials of State and local

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[22] Id.

[23] See Department of Justice, Federal Bureau of Investigation, Interstate Identification Index Phase Three Test Findings June-July, 1987 18-21 (Nov. 30, 1987).

[24] Order No. 1438-90, 55 Fed. Reg. 32,075 (1990) (to be codified at 28 C.F.R. § 20.33(a)(3)).

governments for purposes of employment and licensing.[25] Under that authority, the FBI Identification Division will make all data on identification records available to officials of State and local governments for purposes of employment and licensing.[26] All NCIC data are available to State and local officials for licensing or local/State employment if the dissemination of that data is authorized by federal or State statute approved by the Attorney General.[27]

This exchange of NCIC criminal history record information is subject to cancellation if the information is disseminated outside the "receiving departments or related agencies."[28] The amendment to 28 C.F.R. Part 50, however, also permits dissemination to "other authorized entities."[29]

State dissemination of criminal history data may also be subject to regulations regarding State and local agency and individual criminal history record systems which have been funded

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[25] 28 C.F.R. § 0.85(j).

[26] 55 Fed. Reg. 32,075 (1990) (to be codified at 28 C.F.R. § 50.12). The former rule prohibiting the dissemination of arrest data more than one year old unaccompanied by the disposition of the arrest was eliminated at 55 Fed. Reg. 32,075 (1990). The dissemination provisions of the NCIC regulations at 28 C.F.R. § 20.33(a)(3) specifically reference the procedures of 28 C.F.R. § 50.12.

[27] The Attorney General accepts a state statute as long as it clearly shows that the state legislature intended that a nationwide check be conducted, and it does not violate public policy (e.g., civil rights). Model Child Care Standards Act, supra note 37, at 30.

[28] 28 C.F.R. § 20.33(b).

[29] 55 Fed. Reg. 32,075 (1990) (to be codified at 28 C.F.R. § 50.12).

"in whole or in part with funds made available by the Law Enforcement Assistance Administration."[120] These provisions require States to submit a plan to the Office of Justice Programs (OJP) for criminal record history information systems, whether automated or not, setting forth procedures on completeness and accuracy, limitations on dissemination, general policies on use and dissemination, juvenile records, audits, security, and access and review.[121]

The regulations regarding State criminal history record information systems place limitations on data access, but they do permit dissemination to "[i]ndividuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate State or local officials or agencies."[122] One express restriction on dissemination is that "[n]o agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."[123] The regulations, however, allow the States broad discretion in restricting or disseminating data in State databanks: "States and local governments will determine the purposes for which dissemination of criminal history record

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[120] 28 C.F.R. § 20.20(a).

[121] 28 C.F.R. § 20.21.

[122] 28 C.F.R. § 20.21(b).

[123] 28 C.F.R. § 20.21(c)(2).

information is authorized by State law, executive order, local ordinance, court rule, decision or order."[124]

Thus, in both the cases of State dissemination of data in State criminal history record repositories,[125] and State dissemination of data in the NCIC system,[126] it is largely within the discretion of the States to design procedures for the release of criminal history information.[127]

iv. Improving Data Accuracy in the NCIC System

An Office of Technology Assessment study done in 1979 found severe problems concerning the accuracy of NCIC data.[128] Specifically, 27.2% of NCIC records showing verifiable arrests included no dispositional report, even though a disposition had occurred at least 120 days earlier, according to local court records.[129] Another researcher found that 54% of all NCIC data had some significant record quality problem.[130] In addition, States do not always report data to the NCIC. In 1982, only twenty-two

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[124] 28 C.F.R. § 20.21(c)(3).

[125] This is governed by the provisions of 28 C.F.R. Part 20 Subpart B.

[126] This is governed by 28 C.F.R. Part 20 Subpart C.

[127] However, constitutional challenges have been made against FBI data dissemination procedures. See e.g., Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974).

[128] Loventhal, The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act, 26 Jurimetrics 9, 15 (1987).

[129] Id.

[130] 6 Computer L.J. at 666.

States had disposition reporting rates between 76% and 100%, twelve States between 51% and 75%, five States between 26% and 50%, and eight States had rates below 25%.[51] These data-accuracy problems may have a severe impact in the licensing/employment arena. Incorrect reports may result in employment being denied to a completely innocent individual, while reports for which no disposition data exists may prejudice an employer against hiring an applicant even though that applicant was actually acquitted.

Congress is aware of these accuracy problems, and has adopted legislation to improve the NCIC system. In 1990, Congress authorized additional appropriations for the upgrading of the NCIC for the years 1991 through 1995.[52] This upgrade should mitigate NCIC's data accuracy problems in the future.[53]

The FBI is also taking steps to counter the NCIC data accuracy problem. For example, the FBI recently adopted regulations providing that officials making the determination of suitability for licensing or employment "shall provide the applicants the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record."[54] In addition, the FBI has made further efforts to combat inaccuracy

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[51] 28 Jurimetrics at 15.

[52] National Crime Information Center Project 2000, Pub. L. No. 101-647, §§ 611-614, 104 Stat. 4,823 (1990).

[53] National Crime Information Center: Law Enforcement System is Getting a Major Facelift 2, Government Technology Magazine (November, 1989).

[54] 55 Fed. Reg. 32,075 (1990) (to be codified at 28 C.F.R. § 50.12).

or incompleteness in its files by developing and recommending voluntary reporting standards for the States.[b]/

b. Other National Registration Systems

In addition to the NCIC, Congress has established or proposed a number of other national registries and/or screening procedures. These include the current National Practitioner Data Bank and the proposed "instant check" process for firearms purchases. These and other programs that provide valuable guidance in crafting child abuser screening legislation are discussed in detail in Appendix I.

c. Implications for Proposed Legislation

The NCIC and other federal registration systems presented a number of significant issues considered in the development of the National Child Protection Background Check Act of 1991.

Federal laws and regulations regarding dissemination of criminal history records currently allow for, and seem to encourage, background checks for child care personnel. However, the establishment of procedures for these checks is largely left to the States. The draft legislation's provision for use of criminal history record information for child care personnel background checks facilitates the development of more comprehensive, uniform and effective standards by the States.

The NCIC system can be very useful in providing national criminal history information on prospective child care personnel.

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[b]/ Notice, 56 Fed. Reg. 5,849 (1991).

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The system provides access to millions of FBI arrest and conviction records, and is already used for employment and licensing purposes. Moreover, the system is already subject to significant requirements concerning privacy and the use and dissemination of information. Although the NCIC has data accuracy deficiencies, both Congress and the FBI are taking steps to improve the system.[36/] In this era of fiscal austerity, it is significant that Congress has increased funding to upgrade and expand the NCIC system.

3. Constitutionality and Privacy

In drafting the National Child Protection Background Check Act of 1991, it was necessary to address privacy and other Constitutional questions. The privacy issues include (i) data accuracy and (ii) dissemination. The other Constitutional issues include (i) the denial of due process, (ii) the denial of equal protection, and (iii) the denial of the presumption of innocence. These potential issues and practical means of addressing them are discussed below.

a. Privacy Issues

i. Accuracy

Under Constitutional norms, when a privacy right is invoked, the primary issue is whether the individual has a legitimate expectation of privacy.[37/] The individual must have an

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[36/] See, e.g., Federal Bureau of Investigation, Bureau of Justice Statistics, Recommended Voluntary Standards for Improving the Quality of Criminal History Record Information, 56 Fed. Reg. 5,849 (1991).

[37/] Smith v. Maryland, 442 U.S. 735, 740 (1979).

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actual/subjective expectation of privacy and the expectation must be one that society will recognize as reasonable.[30] In the case of innocent individuals who have inaccurate data disseminated about them to possible employers, such dissemination of inaccurate or incomplete data may be a denial of their right to privacy.[31]

> While recipients may have a valid interest in knowing an applicant's criminal history, inaccurate data do not further this interest, because inaccurate data are not an indication of guilt. Rather, the individual's expectation of privacy, based on the belief that the government will use and disseminate only accurate information, is denied.[32]

Thus, an innocent person would not expect to be denied a job without a good reason and would not expect the State or the possible employer to have access to inaccurate information. Society views this as a reasonable expectation.[33]

The idea that innocent individuals are denied the right to privacy by the dissemination of inaccurate data also has a practical foundation in the Privacy Act of 1974, 5 U.S.C. § 552a(e)(6) (1988) [hereinafter Privacy Act]. The Privacy Act provides, "prior to disseminating any record about an individual to any person other than an agency ...[the agency must]... make reasonable effort to assure that such records are accurate, complete, timely, and relevant for agency purposes."

30/ Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

31/ See, 6 Computer L.J. at 702.

32/ Id. at 705.

33/ Id. at 702.

One court of appeals, basing its decision on notions of privacy and due process[32] found that the FBI had an obligation to reasonably insure that its criminal records were accurate. The court did not state that the dissemination of inaccurate records would be a per se violation, but rather that the FBI needed to have a system that would reasonably assure accuracy.[33] Other courts,[34] however, have stated that this doctrine came to an end once the Supreme Court decided Paul v. Davis, 424 U.S. 693 (1976).[35] These more recent cases would seemingly put an end to the ability of individuals to bring suit against the FBI or local agencies based on inaccuracies in criminal justice records.

When the dissemination of criminal record information is for the purpose of employment rather than law enforcement, however,

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[32] Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974).

[33] Perhaps the system currently in use -- the NCIC Operating Manual, User Agreements, and various codified regulations -- is one that would satisfy the Tarlton court. However, there continues to be a problem in that these rules and regulations are rarely enforced. See 6 Computer L.J. at 710-16.

[34] See Rowlett v. Fairfax, 446 F. Supp. 186 (W.D. Mo. 1978) (denying petitioner's request for expunction of challenged entries for lack of constitutional or statutory interest); Hammons v. Scott, 423 F. Supp. 625 (N.D. Cal. 976) (maintenance, use, and dissemination of arrest records where there was no conviction upheld against privacy and due process claims).

[35] The Supreme Court in Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), held that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." The Court in Paul v. Davis, 424 U.S. 693 (1976), however, reinterpreted Constantineau and held that reputation alone is not enough to make out a constitutional claim, rather what was also needed was an alteration of legal rights already possessed.

it may still be possible to bring suit. The court in Paul established an exception for actions that may alter a legal right. The Court stated: "reputation alone, apart from some more tangible interests such as employment ..." was not enough to make out a claim.[136] Based on this language, subsequent courts have noted a possible claim where employment opportunities have been denied as a result of the dissemination of inaccurate data.[137]

ii. Dissemination

In the drafting process, it also was necessary to analyze potential concerns regarding the unauthorized dissemination of criminal history information. The Privacy Act, 5 U.S.C. § 552a, was created to limit the information found in systems of records that the federal government could disclose to third parties. The Privacy Act also allows individuals to request information on themselves and amend any inaccuracies. Under 5 U.S.C. § 552a(b),

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136/ 424 U.S. at 693 (emphasis added).

137/ See Sadiqq v. Bramlett, 559 F. Supp 362 (N.D. Ga. 1983) (requiring prisoners to present evidence as to whether officials breached constitutional duty to transmit correct information to FBI; also required to show whether this breach was cause in fact and whether the officials' actions were intentional and malicious); Gonzalez v. Leonard, 497 F. Supp. 1058 (D. Conn. 1980)(defendants could not be sued for alleged violation of Privacy Act).

In addition to a possible line of attack through the employment exception, another court noted in a footnote that "[i]t is not clear to this Court that Paul signals the deathknell to challenges to the dissemination of arrest records based on the constitutional right to privacy." This was to note the possibility of litigation when "the information was unconstitutionally gathered or concerns an individual who has been determined to be in no way implicated in the commission of a crime." Hatwig v. Webster, 562 F. Supp. 225, 227 (D. R.I. 1983) (ordering expungement of arrest record of person who had not been indicted).

individuals may waive their privacy rights under the Act simply by giving their prior written consent to the release of information.

If an agency does not receive this prior written consent, the seeker of the information must fall within one of the exceptions to this requirement. Two pertinent exceptions are: (1) dissemination if the information will be used for the purpose for which it was collected,[28] and (2) dissemination for routine use compatible with the purpose for which it was collected after being published in the Federal Register.[29]

Use of the existing system of criminal history records maintained within the NCIC for pre-employment screening appears to meet the "routine use" exception of the Privacy Act. Applicable regulations permit the dissemination of information "[p]ursuant to Pub. L. 92-544 (86 Stat. 115) for use in connection with licensing or local/State employment or for other uses if such dissemination is authorized by Federal or State statutes and approved by the Attorney General of the United States."[30] This information now includes arrest information with no disposition as long as the individual is given the opportunity, prior to final determination, to challenge the information. However, the prospective employee must be given the opportunity to complete, or challenge the accuracy of, the information.[31]

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[28] 5 U.S.C. § 522a(b)(1).

[29] 5 U.S.C. § 552a(b)(3).

[30] 28 C.F.R. § 20.33(a)(3) (1990).

[31] Order No. 1438-90, 55 Fed. Reg. 32,072 (1990)(to be codified at 28 C.F.R. Parts 20, 50).

These regulations conceivably could be challenged on the ground that their enabling provision was adopted prior to the adoption of the Privacy Act.[58] However, no such challenge to the regulations has been made thus far.[59] Moreover, the Department of Justice, in accordance with the Privacy Act, has included in its list of routine uses for NCIC records the dissemination of the criminal history data "to non-criminal justice agencies for use in connection with licensing for local/State employment or for other uses ..." in the same language as 28 C.F.R. § 20.33.[60] The Department thus believes that dissemination of criminal records to non-criminal justice agencies fits within the routine use exception to the Privacy Act.

b. Other Constitutional Issues

i. Denial of due process

The existence of inaccurate information in existing criminal history records poses a risk that a person may be wrongly

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[58] "The [Privacy] Act affects records compiled before the Act's effective date as long as some action judicially reviewable under the Act (such as maintenance of the record, or refusal to permit access or amendment) takes place after the date." Adler, Glitzenstein & Hammitt, "The Privacy Act," Litigation Under the Federal Freedom of Information Act and Privacy Act 251, 254 (1990) (citations omitted).

[59] There have been several court opinions since 1974 which mention the ability of the FBI to disseminate this information to employment agencies without any questioning of the FBI's authority to do so. These cases, however, simply mention the fact of the regulation's existence, the cases are not decided on this point. They are therefore only indicators, and are not controlling on the issue.

[60] See Notice, 55 Fed. Reg. 49,152-49,153 (1990).

denied employment on the basis of such information. One court[97] has held that "an arrest based solely on NCIC information which was inaccurate ... and which had been so for five months ... constituted a denial of due process of law."[98] The result in this case undoubtedly turned on the plaintiff having been denied his liberty for a period of time. However it would appear from the Supreme Court's decision in Paul that a person denied employment opportunities on the basis of an erroneous background check might similarly claim a denial of due process.

ii. Denial of equal protection

Inaccurate criminal history data may result in a denial of equal protection. "Inaccurate ... data classify innocent individuals as criminals, and place the innocent in the same category as the guilty. Thus, groups of individuals not similarly situated -- the innocent and the guilty -- are treated in the same way."[99]

There are other potential equal protection arguments. Since there is no legislative intent to discriminate, the current criminal record system does not by itself discriminate on the basis of race.[100] Legislation that showed a logical connection between

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[97] United States v. Mackey, 387 F. Supp. 1121 (D. Nev. 1975).

[98] Id. at 1122-23.

[99] 6 Computer L.J. at 709.

[100] One court has noted the racially discriminatory impact of arrest records in the context of employment decisions under Title VII of the Civil Rights Act. In that case, however, the court found the defendant did not show any reasonable business purpose for asking about arrests. See Gregory v. Litton (continued...)

a person's arrest/conviction record and some valid purpose or goal would appear to avoid such an equal protection challenge.

iii. Denial of the presumption of innocence

If improperly used, background check procedures arguably could result in a denial of the presumption of innocence.[169] When a person who has been cleared of all charges in a subsequent trial (or whose charges were dropped), is subsequently denied employment opportunities because the government has disseminated the arrest information to an employer, it can be argued that the government procedure is in effect, being used to imply guilt. As a result, great caution must be taken in disseminating arrest information to employers and others outside of the criminal justice system.[170]

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[169] (...continued)
Systems, 472 F.2d 631 (9th Cir. 1972) (found "apparently racially-neutral questionnaire" which asked applicants to reveal arrest records "actually operated to bar employment to black applicants in far greater proportion than to white applicants").

[169] One court found that even if arrest records "were to include the actual disposition of the charges--and such dispositions frequently are not, in fact included--the government knows that a derogatory inference will often nevertheless be drawn that the person who was arrested is also guilty of the crime charged." This court went on to say that "where government action facilitates private discrimination, constitutional strictures should apply." Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975) (citations omitted).

> In addition, "[w]hen the investigation is made by a non-criminal justice entity ... to rely on the criminal justice process to protect the individual is a questionable practice. ... It is too easy for recipients to assume that the individual was guilty of the crime, and to deny the employment or the license." 6 Computer L.J. at 708.

[170] See Order No. 1438-90, 55 Fed. Reg. 32,073 (1990) (discussion of the suitability of arrest information, even without disposition, in the child-care employment area).

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4. Implications for Proposed Legislation

The simplest and most effective way to address Privacy Act concerns is to include a waiver requirement on the background check form. If an individual does not want embarrassing information revealed, he or she can refuse to sign the form. Once the individual has signed the waiver, he or she may not challenge the mere dissemination of the information. However, the challenge procedure incorporated in the proposed legislation protects the individual from the knowing dissemination or use of inaccurate information.

Another way to address privacy concerns would be to restrict access to background check information. This could be done by requiring that an applicant receive a clearance card from the local or State authorities, or by allowing the employer to obtain only the results of a background check, i.e., whether the information received from an applicant is accurate, and not the underlying background check data. Under this approach, the individual must be notified if a search reveals negative information so he or she has the opportunity to challenge any errors.[17]

Although sanctions are generally available for violation of existing dissemination regulations, they are rarely enforced. It would therefore be useful to have mandatory audits that would

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[17] With the implementation of the Interstate Identification Index ("III"), which is computerized and allows for immediate verification with the participating states, inaccuracies should result less often. In addition III has improved data quality made possible by the matching of state and national records. III Status Report, supra note 106.

uncover these and other violations and that would automatically implement sanctions.

b. **Federalism and Funding Issues**

Congress could mandate a comprehensive national program for child care licensing, reporting and background checks. There are a number of reasons, however, why Congress might resist mandating such broad requirements. Congress is generally reluctant to impose broad federal requirements on the States if less intrusive alternatives are available. In the case of proposed child abuse prevention legislation, this reluctance is reinforced by the fact that child care and other public welfare matters are considered to be the primary responsibility of the States. Congress would also be hesitant to supplant existing State systems with a federally-required system because this would require the States to expend considerable effort and money to adapt their laws and procedures to the federal mandate.

A less intrusive approach to the establishment of a uniform federal system is for Congress to enunciate general goals and permit the States to meet these goals through a variety of means. This can be done, for example, by requiring an Executive agency to develop guidelines for acceptable State programs and to certify those State programs that meet the guidelines. Such an approach has a number of advantages. It generally requires fewer and less expensive changes in State programs. In addition, the goal/guideline approach provides the States with greater flexibility and allows the States to develop innovative and cost effective means of meeting federal goals.

Another means promoting State compliance with federal requirements is to make such compliance "voluntary" and promote such compliance by using federal funding as a "carrot and stick". This is the approach generally favored by Congress and the approach taken in past and current child abuser registration proposals. New federal funding can often provide a powerful incentive for State compliance, particularly given the precarious fiscal situation of many States. Similarly, States can be encouraged to comply with federal mandates by tying receipt of existing federal funding to compliance with the new federal requirements. The draft legislation ties compliance to the receipt of federal funding.

III. CONCLUSION

The foregoing analysis demonstrates that effective legislation for the nationwide screening of persons who care for children should contain a number of elements. These elements are summarized below.

A. Improved Reporting Of Crimes

The draft legislation that accompanies this memorandum includes a procedure for uniform reporting by the States to the federal government of child abuse crimes. Like the current McConnell proposal, the draft legislation procedure applies to a broadly-defined class of child abuse crimes. The reporting procedure, however, is flexible enough to encompass other crimes that may indicate a potential for child abuse. This is particularly important given the fact that individuals often "plead down" from child abuse crimes to other charges. In addition, the

uniform reporting procedure includes requirements for accuracy and timeliness of crime reports. The reported information must be made available to those studying the problem of child abuse, with appropriate safeguards to assure the confidentiality of the information.

B. Broad Background Check Procedures

The draft legislation also makes available to child care organizations a procedure for conducting a nationwide criminal history background check on applicants, workers and volunteers. The legislation does not require that child care organizations conduct such a background check. Rather, the States and the organizations themselves should determine when such a check is required or appropriate. Once such a procedure is available on a nationwide basis, it is likely that concerns about potential legal liability and pressure from insurers will encourage many organizations to require background checks of applicants, workers and volunteers.

This background check procedure will be available to a wide range of child care organizations and apply to a broadly defined class of crimes and persons. The procedure will be available to child care centers, schools, voluntary organizations and other organizations that care for, instruct, train, supervise, and provide recreation to children. Based on Mr. Lanning's concerns, the procedure applies to other crimes, as well as child abuse, including crimes of violence, sex crimes and drug crimes. Moreover, because of the range of persons within an organization who might commit child abuse crimes, the procedure will be

available to check on employees, volunteers and anyone else who might have unsupervised access to children. The procedure also will cover both applicants and current child care workers.

C. **Flexibility**

The States currently have a number of existing procedures for conducting background checks, including licensing requirements, "open records" laws and State background checks. It would be counterproductive and unduly expensive for the federal government to supplant these procedures by requiring specific procedures. Thus, the draft legislation permits the States sufficient flexibility in developing and administering background check procedures, but establishes clear guidelines to enable the States to determine which programs and approaches meet the federal goal. In addition, the federal guidelines permit the States to establish record check procedures or other requirements that go beyond the uniform federal standard.

D. **Privacy**

The National Child Protection Background Check Act of 1991 addresses concerns under the Privacy Act by incorporating a requirement that the subject of a background check give written consent to it. In addition, the draft legislation amends federal law, regulation and agency listings to include all aspects of the federal minimum background check as a "routine use" of criminal history records.

To ensure the privacy of the subjects of a records check, the draft legislation seeks to limit disclosure and dissemination of criminal history records beyond authorized agencies of the

State. This can be accomplished by requiring that States only determine the accuracy of a list of crimes submitted by an applicant to the child care organization. Alternatively, privacy can be protected by State procedures which license applicants or certify that they have not committed certain crimes. Under either of these procedures, child care organizations would not have access to an individual's criminal record.

In view of the wide variation among States regarding the confidentiality of criminal history records, however, the draft legislation (i) permits wider disclosure and dissemination of information pursuant to federal guidelines or State law and (ii) includes general guidelines for the protection of such information. The variety of State confidentiality requirements make federal penalties for unauthorized disclosure of information impossible.

B. Challenge Procedures

Because existing NCIC and other criminal history records are often inaccurate, the background check procedure includes a process to enable the subject of a check to challenge and correct a background check. The process is an expeditious one. In addition, the child care organization is prohibited from taking any adverse action (e.g., denying employment or firing) until a challenge is resolved. The organization, of course, has the option of segregating the subject from access to children pending the results of the challenge.

F. Ties To Federal Funding

For reasons discussed above, Congress is most likely to accept a proposal which does not mandate a minimum federal requirement but, rather, ties the receipt of new and current federal funding to compliance with the law. This is the approach taken in the National Child Protection Background Check Act of 1991.

APPENDIX I

Other Federal Registries

The crafting of the National Child Protection Background Check Act of 1991 required (for purposes of guidance and precedent) an examination of other actual or proposed data banks and registries that are operated or regulated by the federal government. This Appendix discusses the operation of these data banks, and analyzes how they address such issues as access, confidentiality and accuracy.

A. The National Practitioner Data Bank (the NPDB)

The Health Care Quality Improvement Act of 1986 (HCQIA),[1] grants immunity to licensed hospitals, certain professional societies, health maintenance organizations, group medical practices, and individual participants in the peer review process from certain types of legal actions brought by physicians against whom corrective action has been taken by a health care entity.[2]

1. NPDB reporting requirements

In addition to granting this immunity,[3] the HCQIA mandates that state medical licensing boards report certain adverse actions taken against physicians by peer review committees to the

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[1] 42 U.S.C. § 11101-11152 (1988).

[2] 42 U.S.C. § 11111(a).

[3] The HCQIA also sets standards for professional review actions, mandating reasonableness, notice and procedural requirements in return for the immunity provisions of the Act. Id. § 11112.

NPDB.[1] The applicable licensing board must report actions taken which revoke or suspend a practitioner's license, and it must report the surrendering of such a license.[2] The action taken must also relate to the practitioner's professional competence or conduct.[3] If the board does not comply with this reporting requirement after an opportunity to correct noncompliance, the Secretary of the Department of Health and Human Services ("HHS") will designate another qualified entity for the reporting of information.[4]

Under the Act, any entity (including an insurance company) that makes any payment in settlement or in satisfaction of a judgment in a medical malpractice action must also report certain information to the NPDB and the appropriate state licensing board in the state in which the incident giving rise to the claim occurred.[5] If an entity fails to report such payments, HHS may impose a $10,000 civil penalty.[6] Health care entities are also obligated to report certain information to the appropriate state licensing board. If a health care entity fails to substantially

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[1] Id. § 11132.

[2] Id. § 11132(a)(1).

[3] Id.

[4] Id. § 11132(b).

[5] Id. §§ 11131, 11134.

[6] Id. § 11131(c).

meet reporting requirements, it may lose its immunity protection under the HCQIA. Id.[10]

2. Disclosure of information by the NPDB

A hospital must request information about a practitioner from the NPDB at the time a practitioner applies for a position on the hospital's medical staff (courtesy or otherwise), or for clinical privileges at the hospital; and every two years concerning a physician or health care practitioner who is on its medical staff (courtesy or otherwise, or has clinical privileges at the hospital).[11] Any hospital which does not access the above information is presumed to have such knowledge.[12] Each hospital may rely on information it has accessed from the NPDB, and a hospital shall not be held liable for this reliance unless the hospital has knowledge that the information provided was false.[13]

Hospitals also may request information concerning a practitioner who is currently on its medical staff (courtesy or otherwise) or has clinical privileges at the hospital. In addition, state licensing boards, other health care entities screening applicants for medical staff appointment, granting of clinical privileges, or for professional review activities, and plaintiffs' attorneys or pro se plaintiffs who have filed medical

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[10] Id. § 11133(c).

[11] Id. §11135(a).

[12] Id. § 11135(b).

[13] Id. § 11135(c).

malpractice actions in state or federal court may receive information from the NPDB.

3. Confidentiality of information

The HCQIA states that information reported to the NPDB is confidential.[14] Persons and entities which receive information from the NPDB must use it solely with respect to the purpose for which it was provided.[15] The HCQIA does not prohibit the disclosure of information by a party which is authorized under applicable state law to make such a disclosure, however.[16] Any person who breaches the confidentiality of information reported to the NPDB is subject to a civil penalty of up to $10,000 for each violation.[17]

4. Disputing record accuracy

Once information is sent to the NPDB, it is held for thirty days.[18] During this time the practitioner and the reporting entity must review the information and resolve any disputes of accuracy.[19] If the entity and practitioner fail to resolve a disagreement, the practitioner has sixty days to notify the NPDB. The practitioner must then notify HHS of the dispute. If HHS determines that the report is incorrect, the report will be

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[14] Id. § 11137(b)(1).

[15] Id.

[16] Id.

[17] Id. § 11137(b)(2).

[18] 54 Fed. Reg. 2 (1989) (to be codified at 45 C.F.R. § 60.6).

[19] Id.

corrected.[20] If HHS decides that the information is accurate, it will include an explanation of the basis for the decision, and the practitioner will be permitted to include a brief statement in the NPDB file regarding the disagreement.[21]

B. Proposed systems for identifying felons who attempt to purchase firearms

In section 6213 of the Anti-Drug Abuse Act of 1988 (the "McCollum Amendment"),[22] Congress ordered the Attorney General to develop a system for the "immediate and accurate" identification of felons who attempt to purchase firearms but are legally ineligible to do so. In response to this mandate, the Department of Justice in 1989 published the Task Force on Felon Identification in Firearm Sales (the "Firearms Report").[23]

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[20] Id. (to be codified at § 60.14).

[21] Id.

[22] Anti Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6213, 102 Stat. 4,181 (1988).

[23] Department of Justice, Office of Justice Programs, Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms, 54 Fed. Reg. 26,902 (1989) [hereinafter Firearms Report]. The Staggers bill, H.R. 1412, 102d Cong., 1st Sess. (1991) would have required the implementation of an instant felon identification system for gun control purposes. The House of Representatives defeated this bill in May of 1991. See "Brady Bill" Passes Easily in House, NRA Measure Fails, Washington Post, May 9, 1991 at A1. The Senate defeated a similar measure in June. See Senate Rejects Instant Checks on Handguns, The Washington Post, June 28, 1991, at A4.

1. Summary of the Task Force Report

In the Firearms Report, the Task Force discussed two general options for implementing the objectives of the McCollum Amendment. The first, Option A, is a point-of-sale approval system that provides gun dealers instant access to automated criminal history records.[24/] After an initial "hit" through this point-of-sale system, a gun dealer would be prohibited from making a sale. The prospective gun purchaser would then have to go through a "secondary verification process," including a fingerprint search by local law enforcement agents, if he or she still wished to purchase a gun. If the agents did not find evidence of a conviction for a disqualifying offense, they would issue a Certificate of Purchase to the prospective purchaser.[25/] The Firearms Report also reviewed variations of Option A, including terminal access by gun dealers to disqualifying information (Option A1),[26/] a system providing gun dealers direct access to disqualifying information through a touch tone telephone program (Option A2),[27/] live scan of prospective purchasers' fingerprints at the time of sale by gun dealers (Option A3),[28/] and a biometric identification card system where the applicants would present an identification card containing biometric information (such as

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24/ Firearms Report, supra note 23, at 28.

25/ Id. at 28-30.

26/ Id. at 45.

27/ Id. at 47.

28/ Id. at 48.

fingerprints) to ensure that the dealer has an accurate identification of the applicant before obtaining any disqualifying information from one of the options above (Option A4).[9]

Under Option B, a prior approval system, prospective gun purchasers would receive a Firearm Owner's Identification Card ("FOID card"), valid for three years. Upon presenting a valid FOID card, a prospective purchaser would be able to purchase a gun.[10] Variations of Option B include a live scan of fingerprints by local law enforcement agents to determine firearm purchase eligibility, and then presentation of a FOID card to a gun dealer after clearance by the law enforcement agency (Option B1),[11] and the issuance of a smart card containing disqualifying information to applicants which would have to be presented before gun purchases (Option B2).[12]

2. Implementing a system at the State and local levels for identifying felons who attempt to purchase firearms

The Firearms Report also examined the federal government's options for implementing an instant check system at the state and local levels.[13] One option the Firearms Report studied is to create a self standing federal system that is run entirely by federal officials. Another is to mandate a cooperative

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[9] Id. at 51.

[10] Id. at 53.

[11] Id. at 63.

[12] Id. at 66.

[13] Id. at 70.

federal/state system in which state officials carry out a substantial portion of criminal history checks. A third option is to establish a mandatory federal standard that states could meet in a variety of ways. A final alternative is to offer states several models of cooperative federal/state systems, and to make federal resources and leadership available to assist states in implementing one of these systems.[b/]

3. Accuracy of criminal records data bases

With respect to the quality of existing criminal history records and accuracy of systems designed to search them, the Firearms Report stated:

> [I]t is reasonable to estimate that nationwide the records of approximately 40-60% or more of felony convictions are not currently available in automated form and thus not immediately accessible by law enforcement authorities. Such a high level of under coverage renders impracticable a felon identification system that relies principally on immediate access to automated conviction records.[n/]

4. Privacy and confidentiality

The Firearms Report also noted the need for confidentiality provisions in a gun control felon identification system:

> [In] many (perhaps most) cases an initial indication of a criminal record would eventually be shown to be untrue because it resulted from a misidentification with someone else with a common name and date of birth. Yet a "hit" on the initial telephone check will

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b/ Id.

n/ Firearms Report, supra note 23, at 10.

> be known to personnel at the gun store and perhaps to customers or others who are present. As a result, the purchaser's reputation within his community may be harmed through no fault of his own. This issue indicates the need for legislative prohibitions on the release by gun dealers and others of anything learned during the telephone check of purchasers, although it may be difficult to enforce such prohibitions against customers or others who may overhear or observe the results of a "hit" during the telephone check.[9/]

Measures preventing direct access to criminal information by non-law enforcement personnel, such as requiring state agencies to reveal only if someone is "eligible" to purchase a gun, and provisions declaring the confidentiality of the information, would address some of these privacy concerns.

9. Appeal processes

The Firearms Report also identified possible appeal options for applicants who are prohibited from purchasing guns by an instant check system. The Report stated that following final denial of a purchase, the applicant should be advised of his or her right to appeal, and should go to the agency designated to handle appeals.[10/] The applicant would provide a copy of the criminal history record used as a basis for disqualification and indicate the basis for the appeal. If errors could not be corrected on the spot or by telephone, the applicant would obtain and submit to the appeals agency documents supporting eligibility (i.e. records of

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[9/] Firearms Report, supra note 23, at 72.

[10/] The Firearms Report does not delineate whether the agency would be a federal, state or local agency. This would have to be determined when implementing an instant check system.

acquittal, pardon, etc.).[10] The appeals agency would then review the documentation and rule on the appeal. If eligibility were established, the individual would receive a FOID card or Certificate of Purchase. If eligibility was denied, the applicant would be advised of his or her rights to a court challenge.[11]

C. **Hate Crime Statistics Act**

The Hate Crime Statistics Act[12] requires the Attorney General to acquire data about crimes motivated by prejudice based on race, religion, sexual orientation, or ethnicity. The Hate Crimes registry is only statistical, and the statistics are not used to identify individual perpetrators or victims. The statute states, "Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of an individual victim of a crime."[13]

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[10] The appeals agency would be required to assist the applicant in obtaining access to this information by providing phone numbers, addresses, etc.

[11] The National Rifle Association argued that a statute implementing an instant check system should state that judicial review of the administrative agency decision would be de novo, without deference to the agency's decision and with the awarding of attorney's fees by the government to prevailing plaintiffs. National Rifle Association of America, Comment on the Draft Report on Systems for Identifying Felons Who Attempt to Purchase Firearms 46 (1989).

[12] Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

[13] Id. § (b)(4).

D. Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA),[51] regulates private consumer credit reporting agencies and is designed to protect consumers from unreasonable invasions of privacy resulting from the misuse of credit reports. The FCRA mandates that consumer credit reports be used only for "legitimate business transactions"[52] and limits the amount of time consumer information may be kept (generally for seven years).[53] The FCRA gives consumers access to their files[54] and provides an opportunity for consumers to correct incorrect information.[55] Consumers can also place statements in their files explaining any disputed information.[56] Under the FCRA, credit agencies must notify consumers when they initiate reports[57] and users of the agencies must inform consumers when adverse action is taken on the basis of credit reports.[58] In addition, the FCRA

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[51] Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1988).

[52] Id. § 1681b.

[53] Id. § 1681c.

[54] Id. § 1681g(a).

[55] Id. § 1681i(a).

[56] Id. § 1681i(b) and (c).

[57] Id. § 1681d, § 1681k.

[58] Id. § 1681m.

provides an array of remedies to consumers for the misuse of credit report information.[9/]

Many privacy advocates have criticized the FCRA as inadequate and ineffective in preventing the misuse of personal credit information, however. Congress is currently considering possible amendments to the FCRA to address the problem of inaccuracies in reports compiled by consumer credit bureaus.[10/]

B. Other Data Bases or Registries

There are some other federal and several state data banks and registries of various types that involve the same issues discussed above. See, e.g., Family and Domestic Violence, Data Collection and Reporting, Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7609, 102 Stat. 4181; Note, Tenant Blacklisting: Tenant Screening Services and the Right to Privacy, 24 Harv. J. on Legis. 239 (1989) (regarding proposed regulation of tenant screening data banks); and various state adoption and organ donor registries.

9/ See Id. §§ 1681n-1681p which permit an injured consumer to bring a civil action in federal court for wrongful use of reports to recover actual and punitive damages, costs, and attorneys' fees. Rights of action against specific entities are also delineated in the statute: §§ 1681n-1681o (sanctions against agencies), § 1681r (sanctions against officers and employees of an agency), and § 1681q (sanctions against people who wrongfully use an agency).

10/ See H.R. 194, 102d Cong., 1st Sess. (1991); H.R. 421, 102d Cong., 1st Sess.; H.R. 670, 102d Cong., 1st Sess. (1991).

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